100

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 104. 8

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, APPELLANT,

vs.

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED JANUARY 17, 1898.

(16,146.)

(16,146.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 409.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, APPELLANT,

vs.

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 19, 1897.

1 *Transcript of Record.*

THE UNITED STATES OF AMERICA, } *To wit:*
District of West Virginia, }

At a circuit court of the United States for the district of West Virginia begun and held at the court-house, in the city of Wheeling, on the first Tuesday of December, being the third day of the same month, in the year of our Lord one thousand eight hundred and ninety-five—present, the Honorable John J. Jackson, judge of the district of West Virginia—among other were the following proceedings, to wit:

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, a Corporation,
vs.
THE BOARD OF PUBLIC WORKS OF THE STATE OF West Virginia, a Corporation; William A. MacCorkle, I. V. Johnson, John M. Rowan, Virgil A. Lewis, and T. S. Riley, Composing the said Board of Public Works, and W. P. Cowan, Sheriff of Brooke County, in said State. } In Equity.

2 *Bill of Complaint.*

In the Circuit Court of the United States for the District of West Virginia. In Chancery.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, a Corporation,
vs.
THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRginia, a Corporation; William A. MacCorkle, I. V. Johnson, John M. Rowan, Virgil A. Lewis, and T. S. Riley, Composing the said Board of Public Works, and W. P. Cowan, Sheriff of Brooke County, in said State.

To the judges of the circuit court of the United States for the district of West Virginia:

The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, a corporation created and duly organized under the laws of the State of Ohio, brings this its bill against "The Board of Public Works," a corporation created and duly organized under the laws of the State of West Virginia; William A. MacCorkle, of Charleston, West Virginia, and a citizen of the State of West Virginia; I. V. Johnson, of Charleston, West Virginia, and a citizen of the State of West Virginia; John M. Rowan, of Charleston,
3 West Virginia, and a citizen of the State of West Virginia; Virgil A. Lewis, of Charleston, West Virginia, and a citizen of the State of West Virginia; T. S. Riley of Wheeling, West Vir-

ginia, and a citizen of the State of West Virginia, and W. P. Cowan, of Bethany, West Virginia, and a citizen of the State of West Virginia.

And thereupon your orator complains and says that it is the owner of and is operating a line of railway running through the States of West Virginia, Pennsylvania, Ohio, Indiana, and Illinois, with numerous branches and divisions, which said line of railway it operates by virtue of the authority of the laws of said States; that its main line runs for a distance of 7.11 miles through the said State of West Virginia, 6.53 miles of said distance being in the county of Brooke, in said State of West Virginia, and $\frac{58}{100}$ miles thereof in the county of Hancock, in said State of West Virginia; that said railroad extends westwardly from the said State of West Virginia into the State of Ohio, and in so doing crosses the Ohio river near the city of Steubenville, in said State of Ohio, by means of a bridge across said river, which said bridge was erected many years ago and is owned, operated, and controlled by your orator and constitutes a part of your orator's said line of railway, and that said Ohio river is a navigable stream and constitutes the boundary line between the said States of West Virginia and Ohio at the point where said bridge is erected.

Your orator further shows that, under and by virtue of the provisions of section 67 of chapter 29 of the Code of the said State of West Virginia, your orator is required, through its president, vice-president, secretary, or principal accounting officers, to make return in writing, under oath, to the auditor of the said State of West Virginia, on or before the first day of April of each year and in the manner prescribed by said section, of the property of your orator which is subject to taxation in the said State of West Virginia, and said auditor is required by said section to lay said return, as
4 soon as practicable after it is made, before a tribunal of said State of West Virginia known as "The Board of Public Works;" and said Board of Public Works is authorized by said section to either approve said return or proceed, in the manner prescribed by said section, to assess and fix the fair cash value of all the property of railroad companies which they are required by said section to return for taxation; and said section also provides, among other things, that as soon as possible after the value of any railroad property is fixed for purposes of taxation by one of the several methods designated by said section, that the auditor shall assess and charge such property with the taxes properly chargeable thereon.

The said "The Board of Public Works" of the said State of West Virginia is, by virtue of section 1 of chapter 56 of the Code of said State of West Virginia, a corporation and is composed of the governor, auditor, treasurer, State superintendent of free schools, and attorney general of said State. The defendant William A. MacCorkle is the governor of said State of West Virginia, the defendant I. V. Johnson is the auditor of said State of West Virginia, the defendant John M. Rowan is the treasurer of said State of West Virginia, the defendant Virgil A. Lewis is State superintendent of free schools of said State of West Virginia, the defendant T. S. Riley is

attorney general of said State of West Virginia, and the said five last-named defendants together constitute the said "The Board of Public Works" of the said State of West Virginia, and the defendant W. P. Cowan is sheriff of the county of Brooke, in said State of West Virginia.

Your orator further shows that before the first day of April, in the year 1894, it made return of its property subject to taxation in the said State of West Virginia for the year 1894 to the auditor of said State in all respects as required by the said section 67 of chapter 29 of the Code of said State of West Virginia, as will more fully appear from a copy of said return, which is herewith filed as
5 part of this bill, marked "Exhibit A." The total length of the said bridge over the said Ohio river, hereinbefore referred to, including the abutments of said bridge, is 2,044 feet, 1,518 feet of which are in the said State of West Virginia and 526 feet of which are in the said State of Ohio, and in making return of its property for taxation for the year 1894 to the auditor of the said State of West Virginia your orator included in the 7.11 miles of main-track railway returned by it, as shown by the said Exhibit A, so much of said bridge as lies within the State of West Virginia, amounting to 1,518 feet. Some time in the month of September, 1894, the said Board of Public Works of the said State of West Virginia met at the city of Charleston, in said State of West Virginia, as provided for by said section 67 of chapter 29 of the Code of said State of West Virginia, to assess and fix the valuation of railroad property in the said State of West Virginia for purposes of taxation, and then and there, refusing to approve your orator's said return, proceeded, among other things, to assess your orator with 6.53 miles of main track and 6.53 miles of second track in the said county of Brooke and State of West Virginia; which said assessment and valuation covers the entire length of said railroad in the State of West Virginia, including so much of the said bridge as lies in said State; and, in addition thereto, valued and assessed the said bridge as a seperate structure at the sum of $200,000.00, placing the tax, upon said bridge at $3,060.00; and the auditor of said State of West Virginia proceeded to assess your orator with the said sum of $3,060.00 taxes upon said bridge, thereby assessing your orator for purposes of taxation for the year 1894 with the entire length of said bridge in the State of West Virginia, to wit, 1,518 feet, as a part of your orator's said railway in said State, and also assessing said bridge for purposes of taxation as a seperate structure at $200,000.00, and thereby assessing and taxing the said 1,500 feet of your orator's said railway a second time for the said year 1894, and insist-
6 ing on the payment of the taxes thereon, and thereby collecting a double tax on the said 1,518 feet of said bridge, which your orator claims and insists should only be assessed and taxed as so many feet of said railroad.

Neither the said "The Board of Public Works," nor any member thereof, nor the said auditor informed your orator of the valuation which had been placed upon your orator's property by said board for taxation, nor of the taxes which had been assessed thereon by

the said auditor, and on the 28th day of September, 1894, your orator, not having been informed of the said action of said board or of the said auditor, addressed a letter through M. J. Becker, its chief engineer, to the said auditor, inquiring of the said auditor what action had been taken by the said Board of Public Works and the said auditor with regard to the assessment of taxes on your orator's property for the year 1894, and neither the said auditor nor any member of the said "Board of Public Works," or any other person, ever answered said letter or gave your orator any information with regard to the valuation or taxation of its property, nor did your orator receive any such information from any source until the 19th day of January, 1895, when your orator received from the said auditor a statement showing, among other things, that the said "Board of Public Works" had placed a seperate or special and additional valuation of $200,000.00 upon said bridge for the purpose of taxation, and the said auditor had proceeded to assess and charge your orator, among other things, with the sum of $3,060.00 as taxes for the year 1894 on the said sum of $200,000.00, the valuation placed upon the said bridge by the said "Board of Public Works."

The total valuation placed upon your orator's property in the said State of West Virginia by the said "Board of Public Works," not including the said seperate or special valuation placed upon said bridge for the year 1894, but including what is known as the
7 New Cumberland branch of your orator's said line of railway, which is situated in the county of Hancock, in the said State of West Virginia, amounting to $310,830.00, the total tax on which amounted for the said year to $4,187.00. On the 19th day of January, 1895, a demand was made upon your orator by the said auditor for the payment of its taxes for the year 1894, including the said sum of $3,060.00, taxes upon your orator's said bridge; and your orator, being advised and believing that the said "Board of Public Works" had no right to impose a tax upon said bridge as a separate structure in addition to its assessment as part of the railroad, and that said auditor had no right to assess or charge your orator with the said sum of $3,060.00 or any other sum as an additional tax upon said bridge as a seperate structure, refused to pay the said sum of $3,060.00, and tendered to the said auditor the full amount of the taxes due on its said railroad in the said State of West Virginia, not including the additional tax on said bridge, to wit, the sum of $4,187.00, which said sum the said auditor accepted, but insisted and still insists upon his right to collect the said sum of $3,060 00 as taxes upon said bridge as aforesaid.

Your orator further shows that on the — day of ——, 1895, the said auditor of the said State of West Virginia added 10 % to the said sum of $3,060.00 to pay the expense of collecting the same, and certified said sum, with the said 10 % added thereto, to the defendant W. P. Cowan, sheriff of the said county of Brooke as aforesaid, for collection; that said sheriff has since said date made a demand upon your orator for the said sum of $3,060.00 and the said 10 % additional thereto, and is now threatening by legal process to collect the said sums and will do so, and will thus inflict great

and irreparable injury upon your orator unless prevented from so doing by the interposition of some court having jurisdiction thereof.

Your orator further shows that its said bridge constitutes a part of its said line of railway and has no seperate earning ca-
8 pacity and no greater earning capacity than any other equal number of feet of your orator's said line of railway, and is used exclusively by your orator in transporting freight and passengers across the said river to and from the said States of West Virginia and Ohio; and your orator is advised and believes, and so charges, that the said bridge is an instrument of interstate commerce, and is not, as a seperate structure from your orator's said line of railway, a proper subject for taxation by the said State of West Virginia in the manner herein set forth.

Your orator therefore charges that the said tax upon its said bridge is illegal and unjust and constitutes a cloud upon the title of your orator to the said bridge, and that by reason of clause 3 of section 8 of article 1 of the Constitution of the United States the circuit court of the United States for the district of West Virginia and the judges thereof are clothed with authority and jurisdiction to restrain and prevent the assessment and collection of the said illegal and unjust tax.

In tender consideration whereof and inasmuch as your orator is without remedy in the premises, save by the aid of this honorable court and the judges thereof, before whom the matters herein complained of are properly cognizable, your orator prays that the said "Board of Public Works" of the State of West Virginia, William A. MacCorkle, I. V. Johnson, John M. Rowan, Virgil A. Lewis, T. S. Riley, and W. P. Cowan be made parties defendant to this bill and be required to answer the same according to law; that all necessary and proper process may issue against the said defendants; that your orator may have an injunction restraining the said defendants, The "Board of Public Works" of the State of West Virginia, William A. MacCorkle, I. V. Johnson, John M. Rowan, Virgil A. Lewis, and T. S. Riley, and each of them, from assessing or attempting to assess any taxes in the future upon your
9 orator's said bridge as a seperate structure, and also restraining the defendant W. P. Cowan from collecting or attempting to collect the said illegal and unjust tax from your orator.

And your orator prays for such other, further, and general relief as to equity may seem good or the nature of its case may require.

And for this it will ever pray, &c.

(Signed) THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
By J. DUNBAR AND
J. B. SOMMERVILLE, *Its Solicitors.*

STATE OF PENNSYLVANIA, } *To wit:*
County of Allegheny, }

This day personally appeared before me, I. M. McKibben, a notary public within and for the State and county aforesaid, M. J. Becker, who, after being duly sworn by me, upon oath says that he is the chief engineer of The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, the plaintiff in the above-entitled cause, and is familiar with the general business of said company, and that the facts and statements contained in the foregoing bill are true.

(Signed) M. J. BECKER.

Taken, sworn to, and subscribed before me this 18th day of March, 1895.

I. M. McKIBBEN,
Notary Public as Aforesaid. [SEAL.]

Endorsed: "Filed in office this 25th day of March, 1895. L. B. Dellicker, clerk."

10 EXHIBIT A.

Copy to J. Dunbar, 2, 21, '95.

Valuation of P., C., C. & St. L. R'y Main Line in the State of West Virginia as Returned for Taxation for the Year 1894.

Brooke county.

Cross Creek district:

Main track....	6.53 miles at	$13,000 00 =	$84,890 00
Second track..	6.53 " "	4,000 00 =	26,120 00
Side track.....12.62 " "	2,500 00 =	31,550 00
Rolling stock..	6.53 " "	3,567 78 =	23,298 00
Telegraph line.	6.53 " "	100 00 =	653 00
Supplies and tools.....			1,306 00
Station-house at Colliers.....			1,300 00
Water tank " "			400 00
Sand-house " "			50 00
Car-house " "			100 00
Trainmen's house "			950 00
Scale-house at "			100 00
Tower west of "			450 00
Tower at New Cumberland Junction.....			800 00
Station at Hollidays Cove.....			180 00
Station at Wheeling Junction.....			400 00
Total listed value for Brooke county.....			$172,547 00

11 $172,547 00

Hancock county.

Butler district:

Main track....	0.58 miles at	$13,000 00 =	$7,540 00	
Second track..	0.58 " "	4,000 00 =	2,320 00	
Side track.....	0.95 " "	2,500 00 =	2,375 00	
Rolling stock..	0.58 " "	3,567 00 =	2,069 00	
Telegraph line.	0.58 " "	100 00 =	58 00	
Supplies and tools....	.....		116 00	
Total listed value for Hancock county.....				14,478 00
Total listed value of main line.....				$187,025 00

Summary of Mileage.

Main track....	7.11 miles.
Second track.....	7.11 "
Side tracks.....	13.57 "
Rolling stock....	7.11 "
Telegraph line.....	7.11 "

Endorsed: "Filed in office this 25th day of March, 1895. L. B. Dellicker, clerk."

12 *Affidavit of J. B. Sommerville.*

In the Circuit Court of the United States for the District of West Virginia. In Chancery.

PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY
vs.
THE BOARD OF PUBLIC WORKS *et al.*

STATE OF WEST VIRGINIA, *County of Wood,* } *To wit:*

This day personally appeared before me, L. B. Dellicker, clerk of the above-named court, J. B. Sommerville, who, after being duly sworn by me, upon oath says he is one of the attorneys for the complainant in the above-named cause, and that since the bill in said cause was sworn to the defendant W. P. Cowan, sheriff of the county of Brooke, has levied upon a freight engine of the above-named complainant for the purpose of enforcing the collection of the taxes upon complainant's bridge mentioned and described in the bill in said cause, and that said W. P. Cowan now has the said engine in his custody.

(Signed) J. B. SOMMERVILLE.

Taken, sworn to, and subscribed before me this 25th day of March, 1895.

L. B. DELLICKER, *Clerk.*

Endorsed: "Filed in office this 25th day of March, 1895. L. B. Dellicker, clerk."

13 *Order of Injunction.*

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY
vs.
THE BOARD OF PUBLIC WORKS *et al.*
} In Equity.

On this 25th day of March, 1895, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company presented their bill, accompanied with affidavit and exhibits, to the undersigned, a judge of this court, against the Board of Public Works *et al.*, praying, amongst other things, for an injunction to restrain the Board of Public Works, and also W. P. Cowan, sheriff of Brooke county, from enforcing and collecting a claim for taxes due the State of West Virginia as well as the county of Brooke.

Upon consideration whereof the court is of opinion and doth order that the bill be filed, with leave to sue out a process against the various defendants named in the bill.

It is further ordered and adjudged that an injunction be awarded against each and all of the defendants restraining and inhibiting each and all of them from enforcing the claim for taxes set out and described in complainant's bill until the further order of this court.

But before this injunction takes effect complainant or some responsible person for it shall enter into bond, with good security,
to be approved by the clerk of this court, at Wheeling, in
14 the penalty of three thousand dollars, conditioned to abide
and perform any decree that the court may hereafter enter in this cause; and the motion for a permanent injunction is set down for hearing on the 4th day of April, 1895, at Wheeling, at the United States court-room at that place.

And it is further ordered that the complainant serve a copy of this order upon each and every one of the defendants, which is to be held as sufficient notice to the defendants of the within injunction.

It is further ordered, upon the filing of the bond required by this order, any property seized or levied upon by the sheriff of Brooke county be released and restored to the defendant company.

Enter.

(Signed) JACKSON, *Judge.*

March 25th, 1895.

Endorsed: "Ent., March 25th, 1895, C. O. Book, page 108."

15 *Subpœna in Chancery.*

UNITED STATES OF AMERICA, } ss:
District of West Virginia, }

The President of the United States of America to the marshall of the district of West Virginia, Greeting:

You are hereby commanded to summon the Board of Public Works of the State of West Virginia, a corporation; William A. MacCorkle, I. V. Johnson, John M. Rowan, Virgil A. Lewis, and T. S. Riley, composing said Board of Publ Works, and W. P. Cowan, sheriff of Brooke county, in said State—

Citizens of and residents in the State of West Virginia, if they be found in your district, to be and appear in the circuit court of the United States for the district of West Virginia aforesaid, at rules to be held in the clerk's office of said court, at Wheeling, on the first Monday in May next, to answer a certain bill in chancery now filed and exhibited in said court against them by the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, a corporation created and duly organized under the laws of the State of Ohio and citizens of and residents in the State of Ohio.

Hereof you are not to fail, under the penalty of the law thence ensuing.

16 And have then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice [SEAL.] of the United States, this 25th day of March, A. D. 1895, and in the 119 year of the Independence of the United States of America.

Attest: L. B. DELLICKER, *Clerk.*

Memorandum.

The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of May, 1895; otherwise the said bill may be taken *pro confesso.*

L. B. DELLICKER, *Clerk.*

Attest: L. B. DELLICKER, *Clerk.*

Endorsed: Served the within subpœna on the sheriff of Brooke —, West Virginia, March 28, 1895, by delivering a duly attested copy thereof to J. N. Baird, deputy sheriff of said county, at

17 Wellsburg. Served on John M. Rowan, I. V. English, and Virgil A. Lewis March 28, 1895, by delivering a duly attested copy thereof to each of them, at Charleston, W. Va. Served on T. S. Riley by delivering to him a duly attested copy thereof March 26, 1895, at Wheeling, W. Va. Served on W. A. MacCorkle by delivering to him a duly attested copy thereof, at Charleston, March 30, 1895. Served on the Board of Public Works of West Virginia, a corporation, by delivering a duly attested copy thereof to William

A. MacCorkle, governor of the State of West Virginia, *ex officio* president of said board of public works. A. D. Garden, U. S. marshal, by B. L. Priddie, deputy.

18 *Injunction.*

At a Circuit Court of the United States for the District of West Virginia, Held at Wheeling, March 25, 1895, at Chambers.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY
vs.
THE BOARD OF PUBLIC WORKS *et al.*
} In Equity.

On this 25th day of March, 1895, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company presented their bill, accompanied with affidavit and exhibits, to the undersigned, a judge of this court, against the Board of Public Works *et al.*, praying, amongst other things, for an injunction to restrain the Board of Public Works, and also W. P. Cowan, sheriff of Brooke county, from enforcing and collecting a claim for taxes due the State of West Virginia as well as the county of Brooke.

Upon consideration whereof the court is of opinion and doth order that the bill be filed, with leave to sue out process against the various defendants named in the bill.

19 It is further ordered and adjudged that an injunction be awarded against each and all of the defendants restraining and inhibiting each and all of them from enforcing the claim for taxes set out and described in complainant's bill until the further order of this court.

But before this injunction takes effect complainant or some responsible person for it shall enter into bond, with good security, to be approved by the clerk of this court, at Wheeling, in the penalty of three thousand dollars, conditioned to abide and perform any decree that the court may hereafter enter in this cause.

And the motion for a permanent injunction is set down for hearing on the 4th day of April, 1895, at Wheeling, at the United States court-room at that place.

And it is further ordered that the complainant serve a copy of this order upon each and every one of the defendants, which is to be held as a sufficient notice to the defendants of the within injunction.

It is further ordered, upon the filing of the bond required by this order, any property seized or levied upon by the sheriff of Brooke county be released and restored to the defendant company.

Enter.

JACKSON, *Judge.*

March 25, 1895.

Attest:
[SEAL.] L. B. DELLICKER, *Clerk.*

A copy.
Attest: L. B. DELLICKER, *Clerk.*

Served within injunction on the sheriff of Brooke county, West Virginia, March 26, 1895, by delivering a duly attested copy thereof to J. N. Baird, deputy sheriff of said county, at Wellsburg, W. Va. Served by delivering a duly attested copy thereof to each of the following-named persons upon the dates and at the places
20 mentioned: To T. S. Riley, a member of the Board of Public Works of West Virginia, March 26, 1895, at Wheeling, W. Va.; to I. V. Johnson, John M. Rowan, and Virgil A. Lewis, members of the Board of Public Works of West Virginia, March 28, 1895, at Charleston, W. Va.; to William A. MacCorkle, a member of the Board of Public Works of West Virginia, a corporation, by delivering a duly attested copy thereof to William A. MacCorkle, governor of the State of West Virginia and *ex officio* president of said Board of Public Works of West Virginia, March 30, 1895, at Charleston. A. D. Garden, U. S. marshal, by B. L. Priddie, deputy.

21 *Demurrer of Board of Public Works.*

The Circuit Court of the United States for the District of West Virginia.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, a Corporation,
vs.
THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA, a Corporation; William A. MacCorkle, I. V. Johnson, John M. Rowan, Virgil A. Lewis, and T. S. Riley, Composing the said Board of Public Works, and W. P. Cowan, Sheriff of Brooke County, in said State, Defendants. } In Equity.

The demurrer of the above-named "The Board of Public Works" of the State of West Virginia, a corporation, duly created and duly organized by and under the laws of said State, to the bill of complaint of the above-named plaintiff.

The defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill set up or contained to be true in such manner and form as the same are
22 therein set forth and alleged, demurs to said bill, and for causes of demurrer shows:

1. That it appears by the plaintiff's own showing that it is not entitled to the relief prayed by the bill against the defendant.

2. The plaintiff has not by *his* bill made such a case as entitles it to any relief against this defendant.

3. Proper parties are lacking.

4. The averments of said bill are vague and uncertain, so much so as to render it doubtful what are the grounds upon which the plaintiff relies for relief.

Wherefore, and for diverse other good causes of demurrer appearing on the said bill, this defendant demurs thereto, and prays the

opinion and judgment of this honorable court whether it shall be compelled to make any answer to said bill. It further humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

(Signed) T. S. RILEY.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

T. S. RILEY,
Attorney for the Board of Public Works and the Members Thereof.

STATE OF WEST VIRGINIA, }
County of Ohio, District of West Virginia, } *ss:*

Thomas S. Riley, being duly sworn, says: "I am one of the above-named defendants, made such as attorney general of the State of West Virginia, and *ex officio* a member of the above-named Board of Public Works. The foregoing demurrer is not interposed for delay."

(Signed) T. S. RILEY.

23 Sworn to before me this 8th day of June, 1895.

(Signed) JAMES W. EWING,
Notary Public.

Endorsed: "Filed in clerk's office June 13, 1895. L. B. Dellicker, clerk U. S. circuit court. Wilson."

24 *Demurrer of W. P. Cowan, Sheriff.*

The Circuit Court of the United States for the District of West Virginia.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
"THE BOARD OF PUBLIC WORKS" OF THE STATE OF West Virginia, a Corporation; William A. MacCorkle, I. V. Johnson, John M. Rowan, Virgle A. Lewis, and T. S. Riley, Composing the said Board of Public Works, and W. P. Cowan, Sheriff of Brooke County, Defendants. } In Equity.

The demurrer of the above-named W. P. Cowan, sheriff of Brooke county, in the State of West Virginia, to the bill of the above-named plaintiff, filed in said court.

25 The defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same

are therein set forth and alleged, doth demur to the said bill, and for cause of demurrer he shows that the plaintiff has not by its bill made such a case as entitles it to the relief sought or to any relief against him, as sheriff as aforesaid or otherwise, as to the matters in said bill contained or any of them. Wherefore, and for divers other good causes of demurrer appearing on the said bill, this defendant doth demur thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any answer to said bill, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

(Signed) THAYER MELVIN,
Solicitor and Counsel for Defendant W. P. Cowan, Sheriff.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

June 8th, 1895.

(Signed) THAYER MELVIN,
Counsel for Defendant W. P. Cowan, Sheriff, &c.

STATE OF WEST VIRGINIA,
County of Brooke, District of West Virginia, } *ss:*

W. P. Cowan, being duly sworn, deposes and says: "I am one of the above-named defendants in my official character as sheriff of Brooke county, State of West Virginia. The foregoing demurrer is not interposed for delay."

Sworn to before me this 8 day of June, 1895.

G. W. McCORD,
Notary Public in and for Brooke County, W. Va.

Endorsed: "Filed in office this 13th day of June, 1895. L. B. Dellicker, cl'k U. S. circuit court. W."

26 *Order Relating to Demurrer and Motion to Dissolve.*

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY
vs.
THE BOARD OF PUBLIC WORKS OF THE STATE OF West Virginia and W. P. Cowan, Sheriff of Brooke County. } In Chancery.

The defendants above named, this 13th day of June, 1895, severally filed their demurrers, in writing, to the plaintiff's bill of complaint, in which demurrers the plaintiff joined; and the defendants respectively moved the court to dissolve the injunction heretofore in this cause awarded; and such motion and said demurrers are now set down for argument on the 18th day of June, 1895, at chambers, in Parkersburg, unless some other day shall in the meanwhile be named by the judge of this court.

Endorsed: 'Entered on page 123 of the chancery order. L. B. Dellicker, clerk." "Enter. Jackson, judge. June 13th, 1895." "To the clerk of the court at Wheeling."

27 *Order Dissolving Injunction.*

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, a Corporation,
vs.
"THE BOARD OF PUBLIC WORKS" OF THE STATE OF West Virginia, a Corporation; William A. MacCorkle, I. V. Johnson, John M. Rowan, Virgil A. Lewis, and T. S. Riley, Composing the said Board of Public Works, and W. P. Cowan, Sheriff of Brooke County, in said State. } In Equity.

The court being advised that this cause is a case of such magnitude and importance to both parties, and that in any event the judgment of this court will be appealed from, it is of opinion to enter an order dissolving this injunction without expressing any opinion as to the questions of law arising upon the demurrer.

It is therefore adjudged, ordered, and decreed that the demurrer to this bill be sustained, and that the injunction heretofore awarded be dissolved and the bill dismissed, which is accordingly done.

Endorsed: "Enter. Jackson, judge. Nov. 30, '95."

28 *Petition for Appeal.*

In the Circuit Court of the United States for the District of West Virginia. In Equity.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY
vs.
THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA *et al.*

The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, plaintiff in the above-named case, conceiving itself aggrieved by an order or decree entered therein on the — day of December, 1895, doth hereby appeal from said order or decree to the Supreme Court of the United States, and doth hereby pray that an appeal and supersedeas may be allowed it in said cause, and that a transcript of the record and proceedings and papers upon which said order or decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
By J. DUNBAR AND J. B. SOMMERVILLE,
Its Attorneys.

Wheeling, W. Va., December 28th, 1895.

29 *Assignment of Errors.*

In the Circuit Court of the United States for the District of West Virginia.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY
vs.
THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA *et al.*

Assignment of errors.

And now, to wit, on this — day of ——, 1895, comes The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, plaintiff in the above-named cause, by J. B. Sommerville, its attorney, and says that in the record and proceedings in said cause there is manifest error, to the prejudice of said plaintiff, in this, to wit:

I.

The assessment and taxation of the plaintiff's bridge, mentioned and described in the bill in said cause, by the defendants as a seperate structure from plaintiff's railroad instead of as a part of said railroad is illegal and improper.

II.

The defendants have assessed and taxed said bridge not only as a seperate structure, but also as a part of plaintiff's railroad, thereby imposing double taxation upon the plaintiff.

30 III.

The defendants failed to notify the plaintiff, even after being requested so to do, either of the amount of taxes assessed against the plaintiff or of the manner in which said taxes were assessed, thereby grossly violating their duty to the plaintiff and preventing the plaintiff from taking an appeal in said cause to the circuit court of Ohio county, West Virginia.

IV.

The assessment and collection of the said taxes under the circumstances of this case would deprive the plaintiff of its property without due process of law.

V.

The assessment and taxation of plaintiff's bridge both as a seperate structure and as a part of plaintiff's line of railroad is an unwarranted and illegal interference with interstate commerce.

VI.

The tax complained of by the plaintiff in this cause constitutes a cloud upon the title to plaintiff's real estate, and especially upon the title to said bridge.

VII.

The circuit court of the United States for the district of West Virginia erred in dismissing the bill in this cause.

31 VIII.

The said court erred in dissolving the injunction in said cause.

IX.

Said court erred in not making said injunction perpetual.

Wherefore the said plaintiff prays that the order or decree of said circuit court of the United States for the district of West Virginia, entered on the — day of December, 1895, may be reversed, and that said court may be ordered and directed to enter an order or decree in said cause making the said injunction perpetual.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
By J. DUNBAR AND J. B. SOMMERVILLE,
Its Attorneys.

Wheeling, W. Va., December 28th, 1895.

32 *Bond and Approval.*

In the Circuit Court of the United States for the District of West Virginia.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY	
vs.	In Equity.
THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA *et al.*	

Know all men by these presents that we, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, a corporation, principal, and Joseph Speidel, of the city of Wheeling, county of Ohio and State of West Virginia, its surety, are held and firmly bound unto the above-named The Board of Public Works of the State of West Virginia in the sum of ten thousand dollars ($10,000); for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, and our several heirs, executors, administrators, successors, and assigns, firmly by these presents.

In testimony whereof the said Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company has caused these presents to be signed by its vice-president and attested by its secretary, and has caused

its corporate seal to be thereto affixed this 16th day of December, 1895, and the said Joseph Speidel has hereunto set his hand and seal this 16th day of December, 1895.

The conditions of the above obligation are such that whereas the above-named The Pittsburgh, Cincinnati, Chicago & St. Louis
33 Railway Company has taken an appeal in said cause to the Supreme Court of the United States to reverse an order or decree rendered in said cause on the — day of December, 1895, by the circuit court of the United States for the district of West Virginia:

Now, therefore, if the above-named The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, plaintiff in said cause, shall prosecute said appeal to effect and answer all damages and costs if it shall fail to make said appeal good, and shall, moreover, pay to the party or parties entitled thereto the unpaid taxes mentioned in the bill in said cause if the order or decree of the circuit court of the United States for the district of West Virginia entered in said cause on the — day of December, 1895, shall be affirmed by the Supreme Court of the United States, then this obligation to be null and void; otherwise to remain in full force and effect.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
By J. T. BROOKS, *Its Vice-President.*
JOS. SPEIDEL. [SEAL.]

Attest:
[SEAL.] S. B. LIGGETT, *Secretary.*

Acknowledged this 30th day of December, 1895.
L. B. DELLICKER, *Clerk.*

Approved this 27th day of December, 1895.
J. J. JACKSON, *Judge.*

34 *Order Allowing Appeal.*

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY
vs.
THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA *et al.*
} In Equity.

And now, to wit, on this 28th day of December, 1895, upon the petition of the plaintiff this day filed in said cause, accompanied by an assignment of errors therein, it is ordered that an appeal and supersedeas be allowed in this cause, as prayed for in the said petition; but this order shall not take effect until the plaintiff shall execute, before this court or a judge thereof, a bond, with good security, payable to the defendant The Board of Public Works of the State of West Virginia, in the penal sum of ten thousand dollars ($10,000), conditioned that the said plaintiff shall answer all

damages and costs if it fail to make said appeal good, and shall, moreover, pay to the party or parties entitled thereto the unpaid taxes mentioned in the bill in this cause, if the order or decree of the circuit court of the United States for the district of West Virginia, entered in said cause on the — day of December, 1895, shall be affirmed by the Supreme Court of the United States.

Endorsed: "Enter. Jackson, judge. Dec. 27th, '95." "Ent. C. O., page 133."

35 UNITED STATES OF AMERICA *ss:*

In the Circuit Court of the United States for the District of West Virginia.

THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY
vs.
THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA *et al.*
} In Equity.

To the Board of Public Works of the State of West Virginia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 20th day of January, 1896, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of West Virginia, wherein The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company is appellant and The Board of Public Works of the State of West Virginia and others are respondents, to show cause, if any there be, why the order or decree entered in said cause by the circuit court of the United States for the district of West Virginia on the — day of December, 1895, should not be reversed and annulled and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 27th day of December, 1895.

J. J. JACKSON, *Dist. Judge.*

35½ [Endorsed:] Service of the within process accepted this 4th day of January, A. D. 1896. Board of Public Works, by T. S. Riley, its attorney.

36 *Order Relating to the Transmission of Transcript to the Supreme Court of the United States.*

And thereupon it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid be transmitted to the said Supreme Court of the United States, and the same is transmitted accordingly.

Test: L. B. DELLICKER, *Clerk.*

Clerk's Certificate.

UNITED STATES OF AMERICA, } *To wit:*
State and District of West Virginia, }

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do hereby certify that the foregoing is a full and true transcript from the record and judicial proceedings of the said court, and contains the record and proceedings in a certain action in equity lately depending in the said court between The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, plaintiff, and The Board of Public Works of the State of West Virginia *et al.*, defendants, with all things concerning the same, as fully and wholly as they exist among the record and proceedings of the court aforesaid, together with the original citation issued and served in said action.

Witness my signature as such clerk and the seal of said court, at Wheeling, this 6 day of January, A. D. 1896.

{ Seal of the Circuit Court United States, District West Virginia, Wheeling, West Va. }

L. B. DELLICKER,
Clerk as Aforesaid.

Endorsed on cover: Case No. 16,146. West Virginia C. C. U. S. Term No., 409. The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, appellant, *vs.* The Board of Public Works of the State of West Virginia. Filed January 17th, 1896.

IN THE

Supreme Court of the United States

THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, *Appellant*,

vs.

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

BRIEF IN BEHALF OF APPELLANT.

Statement of Facts.

This is a suit in equity, brought in the Circuit Court of the United States, for the District of West Virginia, by the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, a corporation created and organized under the laws of the state of Ohio, against the Board of Public Works of the State of West Virginia, a corporation of said State of West Virginia, William A. MacCorkle, Governor of said State of West Virginia; I. V. Johnson, Auditor of said State of West Virginia; John M. Rowan, Treasurer of said State of West Virginia; Virgil A. Lewis, Superintendent of Free Schools of said State of West Virginia; T. S. Riley, Attorney General of said State of West Virginia, composing the Board of Public Works, and W. P. Cowan, sheriff of Brooke county, in said State of West Virginia.

The suit was brought to restrain the defendants from collecting taxes for the year 1894, on the plaintiff's bridge across the Ohio river between the States of West Virginia and Ohio. The bill was filed on the 25th day of March, 1895, and on the same day a temporary injunction was awarded by the Judge of said circuit court, and a motion to make the said injunction permanent was set for hearing on the 4th day of April, 1895.

Section 67 of Chapter 29 of the Code of West Virginia,* made it the duty of the plaintiff, through its president, vice president or principal

*For said section 67 see page 25 of this brief.

accounting officers, to make return in writing, under oath, to the Auditor of the State of West Virginia, on or before the First day of April, 1894, of the property of the plaintiff subject to taxation in the said State for the year 1894, and also made it the duty of the said Auditor to lay said return, as soon as practicable after it is made before a tribunal of said State, known as the Board of Public Works, composed of the Governor, Auditor, Treasurer, Superintendent of Free Schools and Attorney General of said State. The said Statute further made it the duty of the said Board of Public Works, which is declared by section 1 of chapter 56 of said Code* to be a corporation, to either approve said return or proceed in the manner prescribed in said section 67 to assess and fix the fair cash value of all of the property of said plaintiff, which said plaintiff was required by said section 67 to return for taxation.

Said section 67 further provided that as soon as possible after the value of said property was fixed for purposes of taxation, that the said Auditor should assess and charge said property with the taxes properly charged thereon.

The plaintiff, through its proper officer, made the return required of it, in the manner required by said statute, and a copy of said return will be found on pages 6 and 7 of the printed record in this case.

Said return showed that the said plaintiff was the owner of 6.53 miles of main track and the same number of miles of second track in the county of Brooke, in said State of West Virginia, which included the entire length of the said bridge, to-wit: 2044 feet, including the abutments of said bridge, 1518 feet of said bridge being in the State of West Virginia and 526 feet thereof being in the said State of Ohio.

The said Auditor and the said Board of Public Works accepted the said return in so far as it showed the length of the plaintiff's track and charged the said plaintiff with the entire length of track in said county of Brooke, to-wit: 6.53 miles, and then placed a special or additional valuation of two hundred thousand dollars ($200,000) upon said bridge, placing the taxes upon said bridge for said year at three thousand and sixty dollars ($3,060).

Neither the said Auditor nor any member of the said Board of Public Works notified or informed the plaintiff of this action, although on the 28th day of September, 1894, the plaintiff's Chief Engineer, M. J. Becker, addressed a communication to the said Auditor, asking him what action had been taken by himself and the said Board of Public Works with regard to the assessment of taxes on plaintiff's pro-

*For said section 1 see page 32 of this brief.

perty in the said State of West Virginia for the year 1894 The plaintiff received no information from any source as to the action of the said Auditor or the said Board of Public Works with regard to the said taxes until the 19th day of January, 1895, when it was notified by the said auditor, among other things, that it had been assessed with a separate or special valuation upon the said bridge of two hundred thousand dollars ($200,000) and charged with the taxes thereon, amounting to the sum of $3,060, as taxes for the year 1894.

The valuation of the plaintiff's property in the said State of West Virginia, for the year 1894, in addition to the valuation placed upon said bridge was three hundred and ten thousand eight hundred and thirty dollars ($310,830), the total taxes on which amounted for said year to four thousand one hundred and eighty seven dollars ($4,187).

On the 19th day of January, 1895, a demand was made upon the plaintiff by the said Auditor for the payment of its taxes for said year, including the said sum of $3,060 00, taxes upon said bridge, and it tendered to the said Auditor the full amount of the taxes due on its said property for the year 1894, not including the said tax upon said bridge, to-wit: the sum of $4,187 00, which said sum the said Auditor accepted on account of said taxes, but still insisted upon his right to collect the sum of $3,060 as taxes upon the said bridge. A short time after the said 19th day of January, 1895, the said Auditor added 10 per cent to the said sum of $3,060, under the said Statute, to pay the expenses of collecting said sum and certified the said sum, with the said 10 per cent added thereto, to the said W. P. Cowan, sheriff of said county of Brooke. Said sheriff afterwards made a demand upon the plaintiff for the said sum of $3,060 00, and the said 10 per cent additional thereto, and the plaintiff refusing to pay the said sum said sheriff made a levy upon one of the plaintiff's engines to enforce the collection thereof. On the 13th day of June, 1895, the defendants appeared by counsel and filed their demurrer to the said bill, which said demurrer will be found on pages 12 and 13 of the printed record. And at the same time the defendants moved the court to dissolve the said injunction. The matters arising upon the said motion were argued by counsel and submitted to the court, and on the 30th day of November, 1895, the court entered the order or decree found on page 14 of the printed record, sustaining the demurrer, dissolving the said injunction and dismissing the plaintiff's bill, and from said order or decree, the plaintiff appealed, assigning the errors found upon pages 15 and 16 of the printed record.

The plaintiff in this cause insists that the demurrer interposed by

the defendants to the plaintiff's bill, as well as the motion of said defendants to dissolve the preliminary injunction heretofore awarded in this cause, should be over-ruled, for the following reasons:

First—Because the taxation of plaintiff's bridge mentioned and described in the bill, as a separate structure from the railroad, instead of as a part of the railroad, is illegal and improper.

Second—Because the defendants have taxed said bridge not only as a separate structure, but also as a part of defendant's railroad.

Third—Because the defendants failed to notify the plaintiff, even after being requested to do so, either of the amount of the taxes assessed against the plaintiff, or of the manner in which said taxes were assessed.

Fourth—Because the assessment and collection of the said taxes, under the circumstances of the case, would deprive the plaintiff of its property without due process of law.

Fifth—Because the taxation of plaintiff's bridge, both as a part of plaintiff's line of railway and as a separate structure, is an unwarranted and illegal interference with inter-state commerce.

Sixth—Because the tax complained of by the plaintiff constitutes a cloud upon the plaintiff's title to the said bridge.

The plaintiff being a non-resident of the State of West Virginia, under Section 2, of Article 3, of the Constitution of the United States, and the Federal Judiciary Act, this court has concurrent jurisdiction with the courts of the State of West Virginia over the subject matter involved in this cause. And this is true whether the case involves the construction of the Federal Constitution or Statutes, or not. In other words, if there be lodged anywhere within any judicial tribunal of the State of West Virginia, original jurisdiction over the subject matter involved in this case, by reason of the diverse citizenship of the parties, this court has concurrent jurisdiction with such State court. But we insist that the Fourth and Fifth grounds above mentioned involve questions of Federal Law, without regard to the citizenship of the parties.

We, therefore, have a case, as we think, in which this court has jurisdiction on the First, Second, Third and Sixth grounds above mentioned, by reason of the diverse citizenship of the parties, and also has jurisdiction on the Fourth and Fifth grounds, without regard to the citizenship of the parties.

And these grounds above stated will be discussed in the order in which they are above presented.

I.

We insist that plaintiff's bridge ought to be assessed and taxed as so many feet of railroad track, at the average rate per foot at which the entire line of road in the State of West Virginia is assessed and taxed. It is true that the fifteen hundred and eighty (1580) feet of plaintiff's track, comprising that portion of its bridge which lies within the State of West Virginia has cost the plaintiff vastly more money than any other portion of its said road of equal length, but that is the plaintiff's misfortune, and not its fault. It would gladly secure the passage of its trains over the Ohio river at less expense, if it were possible to do so. It would only be too glad to reduce the expense of this portion of its road to an average cost, if that were possible, but it is not possible, and the plaintiff should not be required to bear an enormous and expensive burden of taxation simply because it is not able to accomplish a physical impossibility. This fifteen hundred and eighty feet of track has no separate earning capacity, and no earning capacity other than as so many feet of railway, and is not worth more to the plaintiff than any other equal number of feet, although it cost vastly more.

The theory of the Board of Public Works seems to be that it should continue to pile up taxes in proportion to the expense to which the plaintiff is driven, so far at least as the plaintiff's bridge over the Ohio river is concerned. But even the Board is wholly inconsistent in the application of this theory, and thereby clearly demonstrates the fallacy of the theory.

The plaintiff's other bridges within the State of West Virgin.a which (including the New Cumberland branch and the P. W. & Ky branch) number some eight or ten, are each taxed as so many feet of railway. This is also true as to all of its cuts and fills and of the large number of tunnels of the other lines of railway within the State of West Virginia, and it will be readily conceded that these bridges, trestles, cuts, fills, and tunnels cost vastly more per foot than any ordinary portion of the plaintiff's line of railway.

What reason can there be for making this distinction, and how can these inconsistencies be explained, if the theory adopted by the Board of Public Works be correct? Certainly it would apply to all of the other bridges, and to the trestles, cuts and fills of the plaintiff as well as to the plaintiffs' bridge over the Ohio river.

This clearly demonstrates not only that the Board of Public Works is wrong in the theory, but that it knows that it is wrong.

The Statute conferring upon the Board of Public Works the authority under which it assumed to act in the assessment and tax-

ation of plaintiff's bridge (Sec. 67 of Chap. 29, of the Code of West Virginia) assuming it to be constitutional and valid, clearly shows, as it seems to us, that the bridge is not to be singled out and taxed as a separate structure, but is to be valued as so much railroad. The 5th sub-sec. of Sec. 67, provides that the officer of a railway company who makes the return to the Auditor, provided for by Sec. 67, shall show in detail "Its depots, station houses, freight houses, machine and repair shops, and machinery therein, and all other buildings, structures and appendages connected thereto or used therewith, together with all the other real estate, other than its railroad track, owned or used by it in connection with its railroad, and not otherwise taxed, including telegraph lines owned or used by it, the fair cash value of all buildings and structures and all such machinery and appendages and of each parcel of such real estate, including such telegraph lines and the fair cash value thereof in each county in this State in which it is located."

Now if the plaintiff's bridge is properly taxable as a separate structure, it is by reason of the provisions of this fifth sub-section. It will not be seriously contended that this bridge is included in any of the words "depots," "station houses," "freight houses," "machinery and repair shops and machinery therein." If it is covered by the fifth sub-section at all, it must be by the words "and all other buildings, structures and appendages connected thereto or used therewith, together with all other real estate, other than its railroad track, owned or used by it in the operation of its railroad, and not otherwise taxed, including telegraph lines owned or used by it, and the fair cash value of all buildings and structures, and all such machinery and appendages, and of each parcel of such real estate." The words "And all other buildings, structures and appendages connected thereto or used therewith," are evidently intended to qualify some portion of the said fifth sub-section which precedes them, and to which they are connected by the words "thereto" and "therewith." To what then do these words refer? Do they refer to buildings, structures and appendages connected to and used with the company's depots, or its station houses or its freight houses or its machine and repair shops and the machinery therein? Or do they refer to buildings, structures and appendages connected to or used with the railroad track? They must refer to one or the other of these. There is nothing else to which they could possibly apply. But in any possible event they are buildings and appendages connected to or used with something else, and are not buildings, structures and appendages which form a part of the rail-

road track and are only used incidentally in connection therewith. Now, a bridge, while it may be regarded as a building or a structure in the same sense in which a trestle is a building or a structure, is nevertheless such a building or structure as forms a portion of the railroad track, and is not such a building or structure as is connected to or used with the railroad track. The line of railway would be entirely complete and trains could be run over it from end to end without a depot, or a station house or a freight house or a machine or repair shop, but it would not be complete and trains could not be run over it without the bridges forming the portions of the road which lie across streams of water, ravines, etc.

It is significant, as we think, that the word "bridge" is not only not mentioned anywhere in the fifth sub-section of Section 67, but it is not mentioned in Section 67 at all, while every other possible or imaginable form of building or structure is specifically mentioned in the fifth sub-section. The reason for this, as we think, is that the Legislature regarded railroad bridges as constituting portions of the railroad track, to be included under that portion of the return required by the first sub-section of section 67, which calls upon the company to report to the Auditor the whole number of miles of railroad owned, operated or leased by the company within the State.

It may be claimed that there is some consolation for the defendants in this case to be drawn from the remainder of the fifth sub-section, requiring the railroad company to return to the Auditor "the fair cash value of all buildings, structures, and all such machinery and appendages and of each parcel of such real estate." But we think it clear that the words "buildings," "structures," "and all such machinery and appendages," "and of each parcel of such real estate," refer to the same things which are included in the first portion of the said fifth sub-section by the words "depots," "station houses," "freight houses," "machine and repair shops and machinery therein, and all other buildings, structures and appendages connected thereto or used therewith, together with all other real estate other than its railroad track," and do not include bridges. And in view of the entire sub-section taken together, we think it clear that bridges are intended to be included as part of the railroad track and as exempt from taxation as separate structures. And the intention of the legislation to exempt railroad bridges, which, like the one in controversy, have no separate earning capacity, from special taxation, is made still more manifest by section 63 of chapter 29 of said Code.* By this last mentioned section, the legislature has provnded that railroad bridges with a separate earn-

*For said section 63 see page 31 of this brief.

ing capacity, shall be specially assessed for purposes of taxation by a local officer, and not by the auditor the or Board of Public Works, while it has made no provision whatever for the special assessment or taxation of railroad bridges which have no separate earning capacity. This clearly shows, as we insist, that neither the auditor, the Board of Public Works nor any other officer or tribunal has any authority to specially tax a railroad bridge without a separate earning capacity, or to tax it in any other manner except as a part of the railroad itself.

Counsel for the defendants have considerable to say in their learned and ingenious brief regarding the widely different systems under which railroad property is taxed, and in that connection seek to make a distinction between what they term the "unit" or "entirety" system and a system by counties, and quite a large number of authorities are cited in support of the alleged distinction. It will, of course, be conceded that there is a diversity in the different States in methods of taxation, not only of railroad property, but of all property, but we are not able to see how this aids the defendants. The authorities cited by them nowhere make the distinction which they rely upon. There is no case cited by the defendants, and none that can be cited, which holds that railroad bridges are to be taxed as a part of the line of railway in one class of States, because they have the entirety system of taxation, and that such bridges should be taxed as separate structures in another class of States because they have a system of taxation by counties. Even if such distinction existed it would not aid the defendants. The question is one of the proper construction of our own statute, and under that statute the plaintiff is required to return to the Auditor for assessment and taxation, the whole number of miles of railroad owned, operated or leased by it within the State, as provided by the first subsection of Section 67, all of its rolling stock, as provided by the fourth sub-section, all of its depots, station houses, etc., as provided by the fifth sub-section, all of its personal property, as provided by the sixth sub-section, and its gross expenditures, as provided by the eighth sub-section. And for the purpose of distribution of the taxes when collected it is required to show the number of miles of its railroad track in each county through which it runs, including its branches, side and second tracks, switches, etc. So that for the purpose of assessment and taxation we have what counsel for the defendants term the unit or entirety system, while for the purpose of distribution we have what they call a system by counties. The first is a system of assessment and taxation, while the second is merely a system of distri-

bution of taxes. Our system of assessment and taxation, then, is essentially the unit or entirety system, and if any such distinction as is insisted upon by counsel for the defendants existed, it would be in favor of our theory of the case and not of the theory relied upon by the defendants. No case has been found, and it is believed that none can be found, that bears directly upon this question, unless it be that of Schmidt vs. Galveston, etc., Railroad Company, 24 S. W. Rep. 546, which holds that "A bridge owned by a railroad company on its line of road is properly returned for taxation as so much mileage of railroad, and can not be again taxed as a bridge." This case does not set out the Texas statute and we have been unable to find that statute anywhere else, and are therefore not able to say positively that the case is directly in point, but we think that this case may be fairly understood as holding that in the absence of a statute expressly authorizing the taxation of railroad bridges as separate structures, such bridges can only be taxed "As so much mileage of railroad."

As already shown, our statute does not either expressly or by implication authorize the taxation of a railroad bridge as a separate structure, and in this view Schmidt vs. Galveston, etc., R. R. Co. is directly in point.

Counsel for the defendants lay great stress upon the use of the word "structures" as used in our statute, and insist that a railroad bridge is a structure.

We may concede and in fact have conceded that this is true, and yet it is not such a structure as is referred to in our statute, as we think we have clearly shown.

Tolland vs. Wilmington, cited by counsel for defendants is not in point unless it be the holding that "What constitutes a bridge in a particular case, is a question of fact, rather than a question of law."

The case of the C., M. & St. P. R. R. Co. vs. Sabula, is based upon the Iowa statute, which specifically provides that bridges shall be included in the assessment, and even in that case the court distinctly recognizes the fact that a railroad bridge constitutes a part of the main line of a railroad track. We quote the following language: "If the Illinois Central Railroad Company should purchase this bridge from its present owners (referring to a bridge over the Mississippi river at Dubuque, owned by a bridge company) and continue the running of their trains over the same, it would then constitute a part of the main line of the company, connecting Cairo and Chicago with Sioux City, just as the Sabula bridge (the one in question) constitutes a part

of the main line of the Chicago, Milwaukee & St. Paul Railroad Company," page 181.

Sangamon vs. County of Morgan holds that a railroad track is real property and that the jurisdiction of the county to levy a tax on such property does not extend beyond the limits of the county. It will readily be seen that this case is not in point.

People vs. Sacramento is not in point; that case construes the constitution and statutes of California, and holds that under them a Board of appraisers of a county through which a railroad runs which passes through more than one county, can not change the assessment of the State Board of Equalizations.

Providence vs. Wright does not bear upon this question. The principal point decided in that case is that bridges are real estate, but it nowhere recognizes the distinction sought to be made by counsel for the defendants, and does not hold that it is proper to tax a railroad bridge as a separate structure, instead of treating it as a portion of the railroad track.

Cass County vs. C., B. & Q. R. R. Co. is not in point. It involves the construction of a Nebraska statute, in a case involving the right of local tax authorities to tax a railroad bridge over the Missouri river. The statute requires the officers of the railroad company to return for assessment and taxation to the Auditor of Public Accounts, the number of miles of railroad in each county and the total number of miles in the State, including roadbed, right of way and superstructure thereof, main and side tracks, depot buildings and depot grounds, section and toll houses, rolling stock and personal property, necessary for the construction, repairs or exclusive operation of the road. And it also provides substantially that all other property of the road, both real and personal, shall be returned to the local taxing officers. The question was whether under the statute the bridge over the Missouri river could be taxed by the local officers, and the court held that it could.

So far as the case of Baltimore etc. vs. Western Maryland etc. bears upon this case at all, it is clearly in favor of the plaintiff. It shows that both the Legislative and Judicial departments of the government of Maryland regarded the taxation of railroad bridges as separate structures improper. Alvey, J., in his opinion at page 300 says: "By a distinct clause or provision in that statute (Act of 1876, Chap. 159), it is provided that no extra assessment shall be made and no extra or special tax shall be levied or collected on any bridge or bridges over any streams or any tunnel forming any part of the roadway of

any railroad or railroads in this State; it being the meaning and intent of this Act, that any bridge over streams, or any tunnel forming a portion of the roadway of any said railroads shall be valued at the same rate that any other equal portion of said road is valued." Here, then, is a statute showing that the Legislature of the State of Maryland was so far impressed with the idea that a railroad bridge or tunnel should be treated, assessed and taxed as so much railroad track, that it adopted a positive statute to that effect, and the Supreme Court of the State sustained the statute, not only without questioning the policy of the Legislature in enacting it, but without questioning the right of the Legislature to do so. We think our Legislature has done by implication precisely what the Maryland Legislature did by express enactment, and that our law on the subject is in substance and in effect the same as the Maryland law.

State vs. Mutchler, involved the construction of the New Jersey statute, and held that the bridge in controversy should be taxed separately because it belonged to a foreign corporation which was not a railroad company within the meaning of the statute.

Counsel for the defendants say that they believe that no State having a system such as ours has decided adversely as to the right to tax bridges as bridges and in the counties in which they are located. In reply to this, we beg leave to submit that no court anywhere has decided in favor of the right of a State to tax railroad bridges as bridges or as separate structures.

The contention of counsel for the defendants, that if the railroad were taken away the bridge would still be valuable property, and that as a toll bridge, connecting the city of Steubenville with the thickly populated portion of West Virginia opposite to it, it would have a greater market value than the sum at which the bridge is assessed, is pure assumption, without a particle of proof to support it. This bridge was not built, and was not intended to be used as a toll bridge. If we may be permitted to speculate upon or refer to facts not in evidence, as counsel for defendants have done, in this connection, we might say, and say truly, that the bridge in question is not of sufficient width to make it valuable as a toll bridge, that it is not so situated with reference to the location of the city of Steubenville as to make it useful as a toll bridge connecting said city with the portion of West Virginia lying opposite thereto, and further that said portion of West Virginia is not thickly populated, and there would be little, if any demand for a toll bridge at that point, and that the value of our bridge, considered

simply as a toll bridge, and not as a part of our railroad track, would be very limited indeed.

II.

Even if we should concede that the defendants had the right to assess and tax the bridge in question as a separate structure, it would be undoubtedly true that they would not have the right to tax it both as a separate structure and as a portion of the railroad track, as they have done in this case. The bill charges and the demurrer admits that the bridge was included in the return as a part of the railroad track, and was taxed as such, and that the whole of that tax has been paid to the proper officer of the State, but the defendants, not satisfied with having received the full amount of the taxes on the bridge, considered as a portion of the railroad, placed an additional valuation of two hundred thousand dollars upon it as a separate structure.

In order to sustain the injunction in this cause, it is not necessary for us to attack either of the methods of assessment and taxation referred to by counsel for defendants, but only to show that a State can not resort to both methods at the same time and with regard to the same property. Either the bridge is a portion of the said railroad, or it is a separate structure, and can not, in the nature of things, be both at the same time.

It is scarcely worth while to cite authorities in support of the proposition that the same property can not be taxed twice, whatever may be the method of taxation. If authorities were necessary, we would cite again Schmidt vs. R. R. Co. Supra., which upon this question is precisely in point, and expressly holds that where a bridge is returned and taxed as so much mileage of railroad, it can not again be taxed as a bridge, and this would be especially and emphatically true under Sec. I of Article 10, of the Constitution of West Virginia, providing as it does, for equal and uniform taxation. This section has been fully construed by the Supreme Court of West Virginia in the case of C. & O. R. R. Co. vs. Miller, Auditor, 19 W. Va. 408.

It is true that this case holds that by the constitutional provision above referred to the Legislature was inhibted from passing a law exempting the property of a company from taxation, but it would be equally true that the same section would prevent the taxation of property twice, and would prevent the Legislature from passing an act involving double or unequal taxation, for it would be absurd to say that the Board of Public Works, or any other public functionary,

could impose double or unequal taxation with impunity while the Legislature is prohibited from doing so.

But counsel for defendants say that even if it should appear that a greater length of road or track was assessed than should have been, an injunction will not, for that reason only, be perpetuated or retained. No authority has been cited, and we think none can be, in support of this proposition. In addition to that, this is not a fair statement of the matter in controversy. It is not a case in which too much track has been assessed, but a case in which the same property has been twice assessed and taxed, both as a railroad and as a bridge, and no authority can be found to support such taxation. Indeed, counsel for the defendants practically admit themselves, that it would not only be improper, but illegal. We are also told that our remedy for this improper and illegal taxation was an appeal to the Circuit Court for a proper reduction, and inferentially, at least, that an injunction will not lie. Assuming for the present that the appeal provided for by section 67 could furnish a remedy in any case (a question which we will further discuss in another part of this brief) we answer that under the peculiar and extraordinary facts and circumstances of this case, an appeal was impossible. Section 67 made it the duty of the Auditor to notify the plaintiff of the action of the Board of Public Works as soon as possible after he had completed the assessment. But no such notice was furnished at any time. The Board of Public Works met pursuant to the statute, some time in September, 1894, and on the 28th day of September, 1894, the plaintiff having received no notice or information with regard to its action, addressed a letter through its Chief Engineer, Mr. Becker, to the Auditor, inquiring what action had been taken by the Board with regard to the assessment and taxation of plaintiff's property for the year 1894, but not only did the Auditor persist in his failure to notify the plaintiff as required by the Statute, but he also failed to answer Mr. Becker's communication, and up to the 19th day of January, 1895, it was impossible to get any information from any source touching this question, and the only information that was received then, came in the nature of a demand upon the plaintiff for the taxes which had been assessed upon plaintiff's property for the year 1894.

Under section 67, these taxes were due on the 20th day of January, and it was not only impossible for the plaintiff to appeal from the action of the Board of Public Works within the short period allowed it, but upon the very next day the Auditor, acting under the statute, proceeded to add ten per cent to the amount of the taxes with which

the plaintiff was charged, because said taxes were not paid when due. It was not only impossible to take an appeal, but it was likewise impossible to pay the taxes upon the day upon which they matured, because there was not time enough to do either. The additional ten per cent amounts to $316.00 There is no provision anywhere in the laws of West Virginia for an appeal from the action of the Auditor imposing this additional burden, no matter what the circumstances under which it is imposed.

The injunction is asked for as much for the purpose of relieving the plaintiff from the payment of the additional $216.00 as from the payment of the entire portion of the taxes on the bridge as a separate structure, and as to the $316.00, at least, there is absolutely no appeal to any tribunal, either judicial or ministerial.

This, we think, completely disposes of any suggestion of an appeal in this cause. This double taxation is what counsel for the defendants are pleased to term an "inadvertence" and an inadvertence of such a character that it does not constitute a cloud upon the title of the palintiff to the property involved, and especially that it does not in any respect constitute a cloud upon the title to the bridge. We are at a loss to understand the reasoning by which defendant's counsel reached this conclusion. No authority is cited in support of the proposition and no argument is offered, but counsel content themselves with a mere statement of it.

There will, we think, be no controversy about the fact that the plaintiff's bridge is a part of the plaintiff's real estate.

It is equally clear that all taxes levied upon plaintiff's property are a lien upon plaintiff's real estate, including its bridges. And whether the taxes involved in this controversy be proper or improper, legal or illegal, or whether they be the result of an inadvertence or the result of a wilful and deliberate purpose to wrongfully tax the plaintiff, they are at least an apparent lien which would affect the value of the property in the markets, and that, we respectfully submit, constitutes a cloud upon the title of all of plaintiff's real estate, and is sufficient to give a court of equity jurisdiction to stop the collection of taxes by injunction, if such taxes are improper or illegal.

Counsel for the defendants say a tender should have been made of the legal tax, that is of the taxes on the bridge and the 7.11 miles of track, less 1518 feet, but if the State has no legal right to tax the bridge as a separate structure, then all of the tax upon the bridge is illegal, and constituting as it does a cloud upon the title to the bridge, equity will restrain the collection of it.

The authorities all practically agree as to this proposition, and many of the cases cited by counsel for the defendants are in support of it, as will hereafter be shown. But, if upon the other hand, the court should be of opinion that the tax upon the bridge as a separate structure is legal and is authorized by the West Virginia statute (which we can not think possible), still, as we have already shown, the taxing of this bridge both ways was certainly illegal, and we were under no sort of obligation to make a tender of illegal taxes. It may be further said that no calculation was made as to the amount of taxes which would be due upon the 1518 feet of bridge and no separate bill was presented for said taxes, and the plaintiff did not and could not know how much of the tax demanded of it was assessed upon the 1518 feet of the bridge. In no possible view of the matter therefore can it be justly said that we were under any obligation to make a tender of anything except for the 7.11 miles of railroad, and that we did make, and it was accepted by the Auditor. But it is insisted that the plaintiff was in fault in not reporting the length of track and bridge, and if it had done so, anything like trouble and confusion would have been avoided. This assumes the very matter in controversy in this cause. If it was illegal and improper to tax the bridge as a separate structure, then we were certainly under no obligation to report the length of the track and the bridge, and even if that should be held to be the proper and legal method of taxation, still the Board of Public Works proceeded, itself, to determine the number of miles of railroad with which it would charge the plaintiff, and it is the mistake of the Board, and not the mistake of the plaintiff that we are complaining of, and in no event could the plaintiff be properly or reasonably held responsible for the mistakes of the Board. Counsel contend, however, that at most the injunction will be retained only for the excess, the 1518 feet of track or road.

Again we observe that no authority is cited in support of this proposition and no argument is offered. In reply to it we say that if the double taxation of the 1518 feet of track or road is illegal or improper, that illegality affects the entire tax. If it is illegal in part, it is illegal as a whole. The court can not, in the nature of things, separate it and say a part of the tax is legal and a part of it illegal. Especially is that true in a case such as this, in which no separate valuation has been placed upon the portion of road which is twice taxed.

III.

We have already said in discussing the Second proposition in connection with the question of an appeal nearly all that need be said with regard to the Third proposition. All that need be said here is that by his failure to give the proper notice as required by the statute, and especially by his failure or refusal to answer the letter of inquiry of Mr. Becker, the Auditor practically deprived us of all right of appeal in the case, and not only cut us off from every means of remedy except such as a court of equity can furnish by its injunctive process, but also made it impossible for us to pay these taxes when they were due, even if they had been legal and proper. And then because he had deprived us of these rights, the Auditor proceeded to place upon us an additional burden of ten per cent of the amount of the taxes in dispute. Certainly a court of equity can not permit such conduct upon the part of a public officer and will not hesitate to interfere by way of injunction to restrain the collection of such taxes. If public officers can be permitted to so conduct the affairs of their offices, then all of the property of the State is practically at their mercy. If they can disregard one solemn provision of the statue, a provision, too, which is intended for the protection of the individual citizens of the State, they can with equal impunity disregard any other provision of the statute, or any number of them. And if they can withhold from citizens important information, when politely and properly asked for it, and then hold the citizen responsible for his failure to receive such information and heap additional burdens of taxation upon him for such failure, then indeed is the situation of the property owner an exceedingly perilous one.

If the limitations properly established by legislation are once passed with impunity, then all restrictions upon the conduct of public officers are practically removed and the property of the citizen is entirely subject to their caprice or their greed—a condition of affairs as dangerous to the citizen and as deplorable and as subversive of individual rights as can be found in any of the Monarchial Governments of the Old World, not even excepting the tyranny and oppression visited upon his subjects by the Autocrat of all the Russias. If the court is not to interfere with this reckless disregard of a solemn and important duty, where is the interference to commence, and who shall say what public officers may or may not do in the way of trespassing upon the rights of the citizen and his property. Surely such a condition of affairs calls loudly for the interference of the Chancellor.

IV.

To permit the defendant, Cowan, the Sheriff of Brooke county, to sell the engine upon which he made a levy in this cause, would be to permit him to deprive the plaintiff of that engine, valuable as it is, and essential as it is to the proper conduct of plaintiff's business, in which the public have an interest, without due process of law. We think that the statute authorizing the taxation of railroads in West Virginia is unconstitutional. It will be observed that the State of West Virginia has provided no judicial tribunal whatever for the hearing and decision of questions pertaining to the taxation of railroad property. It is true that it provides for an appeal to the circuit court of the county in which the property is located, but the Supreme Court of Appeals of West Virginia, the court of last resort of that State, has determined that the action of the circuit court in supervising the decision of the Board of Public Works as to the assessment and valuation of railroad property for taxation is merely administrative and not judicial, and that the court acts as an appellate assessment or tax tribunal and exercises powers distinct from those belonging to it as a court or judicial tribunal in the legal sense of that term. The same court has also held that it has no jurisdiction to review by writ of error a decision of a circuit court correcting an order of the Board of Public Works assessing and fixing the value of railroad property for taxation.

P. C. C. & St. L. R'w'y Co. vs. Bd. Pub. Works, 28 W. Va. 264.

It may be contended that a failure to provide a judicial tribunal for the determination of questions of taxation does not of itself deprive the citizen of his property, without due process of law, and that such a statute is not necessarily in violation of section 1 of the 14th amendment to the Constitution of the United States, but even if we concede this, which we only do for the sake of argument, still we think it true that section 67 is clearly unconstitutional and in clear violation of said section 1, and especially do we insist that to permit the sheriff to sell the property levied upon in this case would be clearly to deprive the plaintiff of that property without due process of law.

The statute fixes no time for the meeting of the Board of Public Works. Said Board is not required to and does not in fact notify the railroad companies interested of the time or place of its meeting. Said companies therefore have no opportunity to be heard upon the question of the taxation of their property, except in so far as they

may be heard through the return which the statute requires them to make.

The statute states specifically what that return shall contain. It neither authorizes nor permits a discussion of the questions arising upon the taxation of railroad property. It does not make the return conclusive, either as to the amount, character or value of the property affected. Even in this case, it is insisted by counsel for the defendants that the Board of Public Works is not bound by the return of the railroad company, but can fix its own valuation, not only without regard to that return, but in spite of it. And we think this is a proper construction of the statute in that respect. It may be said that the provision for an appeal gives the railroad company an opportunity to be heard. We may concede, for the sake of argument, that in an ordinary case, that would be true, and yet we have shown in the discussion of both the Second and Third propositions, that the Auditor has deprived us in this case of even the small favor of appealing from the decision of one ministerial tribunal to that of another ministerial tribunal in a matter deeply affecting our entire property in the State.

It is true that less legal formality is required in tax matters than in some other matters involving judicial proceedings, but it is also true that some formality is required, and it is insisted that no court has upheld a statute with such meager requirements as are contained in the West Virginia statute.

In the case of R. R. Co. vs. Commonwealth, 6 Sup. Ct. Rep. 57, a statute of the State of Kentucky, providing for the taxation of railroad property, was held to be constitutional, but it will be observed that the Kentucky statute fixes the time for the meeting of the Board of Equalizations of that State, and Mr. Justice Mathews, in delivering the opinion of the court, laid particular stress upon the fact that the law fixed the time when the Board should meet, and that the Supreme Court of Kentucky had construed that law as providing for a hearing upon the part of the railroad company. On page 61 of the opinion is the following language:

"They (the Board) are required to meet for that purpose on the first day of September, in each year, at the office of the Auditor, at the seat of government, when these returns are to be submitted to them. The statute declares that, 'should the valuations be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof. Said Board shall keep a record of their proceedings, to be signed by each member present at any

meeting and the said Board is hereby authorized to examine the books and property of any railroad company to ascertain the value of its property, or to have them examined by any suitable disinterested person, to be appointed by them for that purpose.' And in the performance of these duties, their sessions are limited to a period of not longer than twenty days in any one year. These meettings are public and not secret. The time and place of holding them are fixed by law. The proceedings of the board are required to be made matter of record, and authenticated by the signature of the quorum present. Any one interested has the right to be present. In reference to this point, the Court of Appeals of Kentucky, in its decision in these cases, says (81 Ky. 492, 512) 'As we construe this act, although in the nature of an original assessment, the parties had a right to be heard, and were in fact, heard before the Board passing on the question of valuation.'"

It will be observed that there is a vast difference between the Kentucky statute and the West Virginia statute. The West Virginia statute does not fix he time for the meeting of the West Virginia Board of Public Works. Said Board is not required to keep a record of its proceedings. There is no limit fixed to the sessions of the West Virginia Board of Public Works. The sessions are not required to be public, and may, for anything the statute contains, be secret. The time and place for holding the meeting is not fixed by law. The proceedings of the Board are not required to be made matter of record and authenticated by the signature of the quorum present, or any one else. There is no provision that any one interested has the right to be present, and there is no decision of the Supreme Court of Appeals of West Virginia, or any other tribunal in West Virginia, holding that the railroad companies have the right to be present at the sessions of the Board of Public Works. We think it may be fairly assumed that had it not been for these provisions of the Kentucky statute, pointed out and dwelt upon by Justice Mathews, the court would have held that statute unconstitutional. Now as these provisions are all lacking in the West Virginia statute, it seems to us that the court will be compelled to hold that statute unconstitutional for want of them. In other words, the West Virginia statute does not contain the provisions which prevented the court from holding the Kentucky statute void, and that being true, the court must hold the West Virginia statute void. And these considerations are strongly emphasized in this case by the fact that the defects in the

West Virginia statute, together with the conduct of the Auditor in refusing to notify the plaintiff of the action of the Board of Public Works deprived the plaintiff of all possible opportunity of being heard either before the Board of Public Works or in the Circuit Court by appeal.

V.

The plaintiff is engaged in inter-state commerce, and the plaintiff's bridge is an instrument of inter-state commerce, and we insist that the taxation of said bridge as a separate structure by the State of West Virginia imposes an illegal burden upon inter-state commerce, and that said bridge as a separate structure is not a proper subject of state taxation. And especially do we insist that the taxation of said bridge both as a part of plaintiff's line of railway and as a separate structure is an unwarranted and illegal interference with inter-state commerce. It has been expressly held by this court that traffic across a river between States is inter-state commerce, and a bridge over such river is an instrument of inter-state commerce. Bridge Co. vs. Commonwealth, 14 Su. Ct. Rep. 1087. Mr. Justice Brown, in delivering the opinion of the court in that case, page 1030, uses the following language: "Under this power (the taxing power) the State may also tax the instruments of inter-state commerce as it taxes other similar property." It is a fair inference from the opinion in this case, and especially from the language quoted, that a State can only tax the instruments of inter-state commerce as it taxes other similar property. Now the State of West Virginia does not tax other similar property, or any other property more than once. And in this case it is not taxing plaintiff's bridge as it is taxing other similar property. As has already been shown, the plaintiff has a number of other bridges over streams in the State of West Virginia, and as will appear from the return made to the Auditor, a copy of which is filed as an exhibit of the bill. Those bridges are taxed as so much railroad and not as separate structures. The defendants are therefore not only doubly taxing the plaintiff's bridge, which is an instrument of inter-state commerce, but they are discriminating against it and in favor of other bridges of the plaintiff and other railroad companies in the State of West Virginia which are not instruments of inter-state commerce, and are imposing burdens of taxation upon plaintiff's bridge which are not imposed upon other simlar property, except, perhaps, bridges used in inter-state commerce. If the defendant can tax an instrument of inter-state

commerce more than once, there is no limit to the number of times said property may be taxed, and the State can therefore impose such burdens of taxation upon instruments of inter-state commerce as to destroy the commerce itself. If it be once determined or conceded that a State may impose double taxation upon instruments of inter-state commerce, then there is no place where the line can be drawn and no limit to the number of times such property may be taxed, and nothing to prevent the State from imposing such burdens of taxation upon it as will result in a practical confiscation of it..

VI.

In the discussion of the Second proposition we have already had something to say with reference to the cloud placed upon plaintiff's title to its bridge by the assessment complained of, and in that discussion we think we have shown conclusively that such tax does constitute a lien upon all of the plaintiff's real estate in the State of West Virginia, including the said bridge. If we are correct in this, all that we need to show in addition thereto to entitle us to an injunction is that the tax upon said bridge is illegal. That the tax upon this bridge is illegal we think we have clearly shown.

Counsel for defendants contend in their brief that no court of equity will allow its injunctive process to issue to restrain the collection of State taxes on the ground merely that they are illegal or unjust or irregular, and that there must be averments in the bill bringing the particular case under some recognized head of equity jurisdiction and further, that great caution is exercised by courts, and particularly Federal courts sitting in equity in the States in such interference with the collection of State taxes. A number of authorities are cited in support of this contention. One of the recognized heads of equity jurisdiction is that the act complained of constitutes a cloud upon the title to real estate. And however reluctant courts of equity may be to interfere with the collection of taxes, it is their duty to interfere and they do promptly interfere in all cases in which taxes are illegal and constitute a cloud upon the title to realty. This is shown by the authorities cited by the defendants, themselves.

In addition to this it has been expressly held by the Supreme Court of the State of West Virginia (and that is certainly good authority in this case) that an injunction will lie against the Auditor of the State to restrain him from the performance of a mere ministerial duty. C. & O. R. R. Co. vs. Miller, Supra,

Dows vs. Chicago, cited by counsel for the defendants holds that "A bill in equity to restrain the collection of a tax will not be sustained on the ground alone that the tax is illegal. It must appear in addition thereto that the enforcement of taxes will lead to a multiplicity of suits, or produce irreparable injury, or throw a cloud upon the title." Mr. Justice Field, in delivering the opinion of the court in that case, uses the following language, "No court of equity will therefore allow its injunction to issue to restrain their (tax collector's) action, except where it may be necessary to protect the rights of the citizen whose property is taxed and he has no adequate remedy by the ordinary process of law. It must appear that the enforcement of the taxes would lead to a multiplicity of suits, produce irreparable injury, or where the property is real estate throw a cloud upon the title of the plaintiff, before the aid of a court of equity can be invoked."

State Railroad Tax Cases hold, in substance, that it is essential to the granting of an injunction that the case be brought within some recognized rule of equity jurisdiction.

The case of Milwaukee vs. Koeffler related to the taxation of personal property, and is therefore not in point. We are not able to see that either Memphis vs. Shelby or Pacific vs. Seivert bear upon the questions involved in this case.

Several other authorities have been cited by counsel for the defendants, but we are unable to see that they afford the defendants any comfort.

Schulenberg vs. Haywood recognizes the rule that Federal courts of equity will enjoin the collection of illegal taxes where they throw a cloud upon the title to real estate.

Enfield vs. Hartford contains a definition of a bridge, and we have no fault to find with that definition, and do not think it militates at all against our contention that the bridge in controversy in this case is not such a structure as is authorized by section 67, to be taxed as a bridge or separate structure.

The case of the C. R. I. & P. R. R. Co. vs. Davenport, holds only that a bridge belonging to the United States can not be taxed as the property of a railroad company.

O'Neal vs. Bridge Company is a case in which the owners of property sought to escape all taxation. We admit our liability to be taxed upon our bridge as so much railroad, and that tax has been assessed and has been paid by us.

Robertson vs. Anderson was a case in which the question was

whether the valuation of the land in controversy and the improvements thereon should be aggregated or stated separately.

Kirtland vs. Hotchkiss was a case in which the questions involved arose between a state and one of its citizens and not a case in which the questions arose between a State and a citizen of another State.

Thompson vs. Pacific, etc., involved the question of the exemption of certain property from all taxation.

State Tax Cases hold simply that "The power of taxation of the State is limited to personal property and business within her jurisdiction, and that all taxation must be related to one of these subjects.

Home Ins. Co. vs. N. Y. relates to the right of a State to tax United States bonds and corporate franchises, and has no relation to the case at bar.

Transportation Company vs. Wheeling relates to taxes levied by a State upon vessels owned by citizens of the State.

Wiggins F. Co. vs. E. St. Louis is primarily a case in which the Ferry Company claimed exemption from all taxation

Huse vs. Glover involved questions relating to the navigation and improvement of navigation of certain rivers in the State of Illinois, and the right of that State to impose a tax or tonnage duty upon vessels engaged in such navigation.

Ratterman vs. W. U. T. Co. involved the right of the State of Ohio to impose a tax on inter-state commerce.

W. U. T. Co. vs. Mass. relates to the liability of a telegraph company to be taxed upon its real and personal property in the States in which it does business, and also the right of a State to impose a tax upon agencies of the Federal Government, and it is not perceived that anything contained in it militates against the claims of the plaintiff in this case.

The same may be said of Shelton vs. Platt.

Bridge proprietors vs. Hoboken & Co. involved the construction of an act of the Legislature of New Jersey, authorizing the taxation of a bridge over the Hackensack river, in that State, and held that the "structure" referred to by Mr. Justice Miller in his opinion in the case, was not a bridge within the meaning of the New Jersey statute.

The statement made by counsel for defendants that "officers have assessed and collected this tax on bridges over the Ohio, belonging to railroad companies since 1863," is not supported by anything in the record. It is a pure assumption without anything to sustain it. And, if it were true, it would not follow that because some other railroad

company has been paying an illegal and improper tax the plaintiff is bound to do so.

There are some other cases referred to by counsel for the defendants and some other points sought to be made by them, but it is not believed that any comment upon them is necessary.

It is respectfully insisted that the demurrer of the defendants, as well as their motion to dissolve the preliminary injunction heretofore awarded in this case, should both be overruled, and said injunction should be made permanent.

J. DUNBAR and
J. B. SOMMERVILLE,
Attorneys for Plaintiff.

§67. The president, vice president, secretary or principal accounting officers of any corporation or company owning or operating a railroad or railway, wholly or in part within this State, for the transportation of freight, or passengers, or both, for compensation, shall make a return in writing to the auditor on or before the first day of April in each year, which shall be signed and sworn to by one of said officers, showing in detail the following particulars for the year ending on the thirty-first day of December, next preceding, viz:

First. The whole number of miles of railroad owned, operated or leased by such corporation or company within this State.

Second. If such road so owned, operated or leased by such corporation or company be partly within and partly without this State, the whole number of miles thereof within this State, and the whole number of miles without the same, including its branches in and out of the State.

Third. Its railroad track in each county in this State through which it runs; giving the whole number of miles of road in the county, including the track and its branches, and side and second tracks, switches and turnouts therein, and the fair cash value per mile of such railroad in each county, including in such valuation such main track, branches, side and second tracks, switches and turnouts.

Fourth. All its rolling stock; giving a detailed statement of the number of cars, including passenger, mail, express, baggage, freight and other cars of every description, and the fair cash value of all such cars used wholly, or in part, in this State, distinguishing between such as are used wholly in this state and such as are used partly within and partly without the State; the whole number of engines, including their appendages used wholly or in part within this State, distinguishing between such as are used wholly within this State and such as are used partly within and partly without the same, and the fair cash value of such as are used wholly within the State, and such as are used partly within and partly without the State; and the proportional value of such cars and engines used by it partly within and partly without the State, according to the time used and the number of miles run by such cars and engines in and out of the State; and the proportional cash value thereof to each county in this State within which such railroad runs.

Fifth. Its depots, station houses, freight houses, machine and repair shops and machinery therein, and all other buildings, structures and appendages connected thereto or used therewith, together with all other real estate other than its railroad track, owned or used by it in

connection with its railroad, and not otherwise taxed, including telegraph lines owned or used by it, and the fair cash value of all buildings and structures, and all such machinery and appendages, and of each parcel of such real estate, including such telegraph line, and the cash value thereof in each county in this State in which it is located.

Sixth. Its personal property of every kind whatsoever including money, credits and investments, wholly held or used in this State, showing the amount and value thereof in each county.

Seventh. Its actual capital stock and the number, amount and value in cash, of the shares thereof; the amount of its capital stock actually paid in; the total amount of its bonded indebtedness, and of its indebtedness not bonded; its gross earnings for the year, including its earnings from its telegraph lines, which shall be stated separately, on the whole length of its road, including the branches thereof, in and out of the State, and also such earnings within this State on way freight and passengers, and the proportion of such earnings in this State on through freight and passengers carried over its lines in and out of the State, to be ascertained by the number of miles the same were carried by it within and the number of miles without the State.

Eighth. Its gross expenditures for the year, giving a detailed statement thereof under each class or head of expenditure. If any corporation or company fail to make such return to the auditor as herein required, it shall be guilty of a misdemeanor and fined one thousand dollars for each month such failure continues. Prosecutions for such failure shall be in the county wherein the seat of government is. If such return be made to the auditor, he shall lay the same, as soon as practicable thereafter, before the board of public works, and if such return be satisfactory to the board it shall approve the same, and by an order entered upon its records, direct the auditor to assess the property of such corporation or company, with taxes, and he shall thereupon assess the same as hereinafter provided. But if such return be not satisfactory to the board, or if any such company fail to make such return as herein required, said board of public works shall proceed in such manner as to it may seem best to obtain the facts and information required to be furnished by such return; and to this end the said board may send for persons and papers, and may compel the attendance of any person and the production of any paper necessary, in the opinion of said board, to enable it to obtain the information desired for the proper discharge of its duties under this section. Any expenses necessarily incurred by said board in procuring such infor-

mation shall be paid by the governor out of the contingent fund. If any person shall refuse to appear before said board when required by it to do so, as aforesaid, or shall refuse to testify before said board in regard to any matter as to which said board may require him to testify, or if any person shall refuse to produce any paper in his possession or under his control, which said board may require him to produce, every such person shall be guilty of a misdemeanor, and fined five hundred dollars and shall be imprisoned not less than one nor more than six months, at the discretion of the court. Prosecutions against any such person shall also be in the county wherein the seat of government is. As soon as possible after the board of public works shall have procured the necessary information to enable it to do so, said board shall proceed to assess and fix the fair cash value of all the property of said corporation or company hereinbefore required to be returned by it to the auditor, so far as the said board has been able to ascertain the same, in each county through which the railroad of any such corporation or company runs. In ascertaining such value the board shall consider any return which may have been previously made to the auditor by such corporation or company, and all the evidence and information it has been able to procure by the means aforesaid, and all such as may be offered by such corporation or company. And the decision of said board thereon made shall be final, unless the same be appealed from within thirty days after such decision comes to the knowledge of the president, vice president, secretary or principal accounting officer, or the attorney of such corporation or company transacting business for it in the county wherein the seat of government is, in the manner following. Any corporation or company claiming to be aggrieved by any such decision, may within the time aforesaid, appeal therefrom as to the assessment and valuation made within each county through which its road runs, to the circuit court of such county; and such appeal shall have precedence over all other cases on the docket of such court, and be tried in the shortest time possible after such appeal is docketed. The court shall hear all such legal evidence on such appeal as may be offered by the State, county, district or municipal corporation, and by the corporation or company taking such appeal. And if the court be satisfied that the value so fixed is correct, it shall confirm the same; but if it be satisfied that the value so fixed by said board is either too high or too low, the court shall correct the valuation so made and ascertain and fix the true value of such property according to the facts proved, and

certify such value to the auditor. In case the lists and valuations of the property filed with the auditor as aforesaid, be satisfactory to the board of public works, and in cases where an assessment of the property of such company is made by the board of public works as aforesaid, the auditor shall immediately certify to the county court of each county through which such railroad runs, the value of the property therein of every such company as valued or assessed as aforesaid, and it shall be the duty of such court to apportion the whole of such value between such districts and independent school districts in their county through which said road runs, as near as may be according to the value thereof, and then a proportional valuation to each municipal corporation in their county through which said road runs according to the value thereof. It shall be the duty of the clerk of the county court of every county through which any railroad runs, within thirty days after the county and district levies are laid by such court to certify to the auditor the apportionment made by the county court as aforesaid, and the amount levied upon each one hundred dollars' value of the property in the county for county purposes, and on the value of the property in each magisterial district through which such railroad is located, for district purposes. It shall also be the duty of the secretary of the board of education of every school district and independent school district through which the railroad runs, in each county, within thirty days after the levy is laid therein for free school and building purposes, or either, to certify to the auditor the amount so levied on each one hundred dollars' value of the property therein for each of said purposes, and it shall be the duty of the recorder, clerk or other recording officer of every municipal corporation, through which such railroad runs, within the same time after a levy is laid therein for any of the purposes authorized by law, to certify to the auditor the amount levied upon each one hundred dollars' value of the property therein for each and every purpose. Any clerk of a county court, secretary of a board of education, or recorder, clerk or other recording officer of a municipal corporation, who shall fail to perform any of the duties herein required of him, shall be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars. In case of the failure of any such officer to furnish to the auditor the certificate herein required, the auditor may obtain the rate of taxation for any of said purposes from the copies of land books on file in his office, if the same be found in such books, if not, in such other way or manner as he may deem necessary or proper for the purpose. As soon as

possible after the value of the property of such corporation or company is fixed by the board of public works, or by the circuit court on appeal as aforesaid, and after he shall have obtained the information herein provided for to enable him to do so, the auditor shall assess and charge the property of every such corporation or company with the taxes properly chargeable thereon, in a book to be kept by him for that purpose, as follows:

First. With the whole amount of taxes upon its property for state and state school purposes.

Second. With the whole amount of taxes on its property, in each county through which its road runs, for county purposes.

Third. With the whole amount of taxes on its property in each magisterial district through which its road runs, for road and other district purposes other than free school and building purposes.

Fourth. With the whole amount of taxes on its property in each school district and independent school district through which its road runs, for free school and building purposes; and

Fifth. With the whole amount of its taxes on its property in each municipal corporation through which its road runs, for each and all of the purposes for which a levy therein is made by the municipal authorities of such corporation. And no injunction shall be awarded by any court or judge to restrain the collection of the taxes or any part of them so assessed, except upon the ground that the assessment thereof was in violation of the constitution of the United States, or of this State, or that the same were fraudulently assessed, or that there was a mistake made by the auditor in the amount of taxes properly chargeable on the property of said corporation or company; and in the latter case no such injunction shall be awarded unless application be first made to the auditor to correct the mistake claimed, and the auditor shall refuse to do so, which facts shall be stated in the bill. The auditor shall, as soon as possible, after he completes the said assessments, make out and transmit by mail or otherwise, a statement of all taxes and levies so charged to the president, vice president, secretary or principal accounting officer of such corporation or company and it shall be the duty of such corporation or company so assessed and charged, to pay the whole amount of such taxes and levies upon its property, into the treasury of the State, by the twentieth day of January next after the assessment thereof, subject to a deduction of 2½ per centum upon the whole sum if the same be paid on or before that day. If any such corporation or company fail to pay such taxes and levies by the said twentieth day of January, the

auditor shall add ten per centum to the amount thereof, to pay the expenses of collecting the same, and shall certify to the sheriff of each county the amount of such taxes and levies assessed within his county; and it shall be the duty of every such sheriff to collect and account for such taxes and levies in the same manner as other taxes and levies are collected and accounted for by him. And when the district and independent school district taxes and levies are collected by him, he shall immediately pay the same to the treasurer of the proper district. Neither the county court of any county, nor any tribunal acting in any county in lieu of a county court, or otherwise, nor any board of education, nor the municipal authorities of any incorporated city, town or village, shall have jurisdiction, power or authority, by compromise or otherwise, to remit or release any portion of the taxes or levies so assessed upon the property of any such corporation or company; and when such taxes and levies are certified to the sheriff of any county for collection, as aforesaid, it shall be his duty to collect the whole thereof, regardless of any order or direction of any such county court, tribunal, board of education or municipal authority to the contrary; and if he fail to do so, he and his securities on his official bond shall, unless he be restrained or prohibited from so doing by legal process from some court having jurisdiction to issue the same, be liable thereon for the amount of said taxes and levies he may so fail to collect, if he could have collected the same by the use of due diligence. Any member of a county court, or tribunal acting in lieu thereof, or of a board of education, or of the council, or other tribunal of a municipal corporation, who shall vote to remit or release any part of the taxes so assessed on the property of any such corporation or company, shall be guilty of a misdemeanor, and fined five hundred dollars, and shall be removed from his office by the court by which the judgment of such fine is rendered, in addition to such fine. When such taxes and levies due to a municipal corporation are collected by the sheriff, he shall pay the same to the proper collecting officer or treasurer of such municipal corporation or otherwise, as the council, or other proper authority thereof may direct. And when such taxes and levies are paid into the treasury, as herein provided, the auditor shall account to the sheriff of each of the counties to which any sum so paid in for county levies belongs, for the amount due such county, and may arrange the same with such sheriff in his settlement for the State taxes in such a way as may be most convenient; and the sheriff shall account to the county court of his county for the amount

so received by him, in the same manner as for other county levies: Provided, that the taxes assessed for the last year of the term of office of a sheriff shall be paid to or settled with, the sheriff who was in office at the time the assessment was made. The amount so paid in for each district and independent school district shall be added to the distributable share of the school fund payable to such district, and paid upon the requisition of the county superintendent of free schools, in like manner as other school moneys are paid. The auditor shall certify to the county court of every such county, on or before the first day of April in each year, the amount with which the sheriff thereof is chargeable on account of the levy upon the property of such company. He shall also certify to the county superintendent of free schools the amount of such levies due to each district and independent school district in his county for free school purposes. The amount so paid in for each municipal corporation shall, as soon as received by the auditor, be paid over to the treasurer of the municipal corporation to which such taxes are due, or to such other officer of the corporation as the council may designate, and the auditor shall report such payment to the council. But the failure of the clerk of any county court, or the secretary of any board of education, or the proper officer of any municipal corporation, to certify to the auditor the levies or apportionment within the time herein prescribed, shall not invalidate or prevent the assessment required by this section, but the auditor shall make the assessment and proceed to collect or certify the same to the sheriff, as soon as practicable, after he shall obtain the information necessary to make such assessment. The right of the State, or of any county or district, or municipal corporation to enforce by suit or otherwise, the collection of taxes or levies, heretofore assessed, or the right to which has heretofore accrued, shall not in any manner be affected or impaired by anything in this chapter contained. All buildings and real estate owned by such company and used or occupied for any purpose not immediately connected with its railroad, or which is rented or occupied for any purpose to or by individuals, shall be assessed, with the taxes properly chargeable thereon, the same as other property of the like kind belonging to an individual. No such company or corporation as is mentioned in this section shall be exempt from taxation, whether the same has been or may be created, organized or operated by, under or by virtue of any general or special law or laws, or whether heretofore exempted from taxation or not, but this section shall apply to all such companies and corporations without distinction or exception."

§1. "The governor, auditor, treasurer, superintendent of free schools, and attorney general, shall be and continue a corporation under the style of 'The Board of Public Works.'"

§63. "The assessors shall ascertain the yearly value of all toll bridges and ferries in his district, except such as are by law exempt from taxation. He shall make a just estimate of their annual value. For purposes of taxation, the value of a toll bridge or a ferry shall be taken to be ten times its annual value. The assessors shall also ascertain the yearly value of all railroad bridges upon which a separate toll or fare is charged in his district, except such as are by law exempt from taxation, and shall make a just estimate of their annual value. For purposes of taxation, the value of a railroad bridge, upon which a separate toll or fare is charged, shall be taken to be ten times its annual value."

No. 184. S.

Brief of Rucker for Appellee

Filed Jan 24, 1898.

IN THE

Supreme Court of the United States

JANUARY TERM, 1898.

THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, *Appellant*,

vs.

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA, *Appellee*.

Brief of the Attorney General of West Virginia, for Appellee.

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Brief of the Attorney General of West Virginia, for Appellee.

Associate counsel in this case have already filed a brief for the appellee, which I think fully covers most of the questions involved, and answers the points made by the counsel for the appellant, and I shall therefore devote my attention to the discussion of only one or two points which have been mentioned but perhaps not fully discussed.

Counsel for the appellant insist that the defendants' demurrer and motion to dissolve the injunction in the Court below, should both have been over-ruled, and in support of this contention, give six reasons, which reasons form the basis of the principles upon which the plaintiff relies in its hope to succeed in this proceeding. In other words, these reasons all relate to the merits of the suit and not to the form of the pleading or, any technical questions. In order that I may the better make my meaning clear, I quote these reasons which are as follows:

"First.—Because the taxation of plaintiff's bridge mentioned and described in the bill, as a separate structure from the railroad, instead of as a part of the railroad, is illegal and improper.

Second.—Because the defendants have taxed said bridge not only as a separate structure, but also as a part of defendant's railroad.

Third.—Because the defendants failed to notify the plaintiff, even after being requested to do so, either of the amount of the taxes, assessed against the plaintiff, or of the manner in which said taxes were assessed.

Fourth.—Because the assessment and collection of the said taxes, under the circumstances of the case, would deprive the plaintiff of its property without due process of law.

Fifth.—Because the taxation of plaintiff's bridge, both as a part of plaintiff's line of railway and as a separate structure, is an unwarranted and illegal interference with inter-state commerce.

Sixth.—Because the tax complained of by the plaintiff constitutes a cloud upon the plaintiff's title to the said bridge."

I desire to discuss but two of the points relied on—the first and the last—the others having been fully covered, in my opinion, by my associates in their brief filed herein.

IS THE TAXATION COMPLAINED OF IMPROPER?

Counsel for the plaintiff seem to be very positive that this is an improper exercise of the taxing power of the State, but it seems to me that their position is not sustained by either authority or reason. It is certainly true that such taxation has been held—by implication at least—to be legal and proper in the Court of last resort in the State of West Virginia, where this bridge is situated, and that the Courts of this State have permitted such taxation for a long number of years. In the case of the *Pittsburg, Cincinnati, Chicago & St. Louis Railroad vs. The Board of Public Works* (*28 W. Va., 264*) in which the plaintiff in this proceeding was the plaintiff, and the question involved was the correct valuation of this same bridge, the Court declined to interfere with the assessment, and held that the action of the Circuit Court in supervising the assessment and valuation of railroad property, was merely administrative, and not subject to review or correction by the Court of Appeals. Counsel for appellant misconstrue the scope and effect of this decision. The Court only passed on the question of the valuation of the property, not the right to tax it at all. The Court says:

"Under our Consititution the Supreme Court of Appeals of the State has no power to review by writ of error or appeal, the decisions or orders of inferior tribunals, officers or boards as to matters

which are simply administrative or legislative and not strictly judicial in their nature, except where such power may be expressly conferred by the Constitution."

Had the taxation itself been illegal or improper, it would have been the manifest duty of the Court to relieve the plaintiff.

But the counsel for the appellant contend that this bridge should not be assessed at any higher rate than other portions of the plaintiff's track, because its carrying capacity is no greater, that the expense of its construction is not to be considered, and that the Code of West Virginia, ch. 29, sec. 63, provides what bridges shall be taxed, and as bridges, such as the one under consideration, are not mentioned in this section, that, by implication, the law of the State necessarily excludes them. This reasoning at first may appear sound, but is not supported by every day experience in matters of taxation. Taxable value is ascertained just as the value of this bridge was, by estimating the worth of the property. If the plaintiff were going to sell its property, and for that purpose should divide its line of railroad, selling that portion thereof in West Virginia to one purchaser, and the bridge to another, it is scarcely probable that it would be willing to sell this bridge at the same price it would any other 1580 feet of its track. Besides the very cost of the bridge gives it an additional value over the same length of track elsewhere, by preventing competition and giving the road, by reason of this bridge an advantage over less fortunate competitors and thus bringing more additional business than so much track. The Board of Public Works has assessed this property in accordance with well-established principles, that is, according to its market value.

The section of our Code referred to, is given in full on page 33 of the appellant's brief, and even a casual reading will show that it refers alone to toll bridges, and has no possible reference to bridges such as we have under discussion. It is certainly straining the construction to say that this means that no other bridges shall be assessed or taxed. Such a law would be unreasonable. To say that an individual, or corporation, may own and use for its own convenience and profit a bridge, or other property, and the same not be subject to taxation until the owner charges *others* for the use of it, would be as unreasonable as to say that no man who keeps a carriage for his own use and pleasure, should not be taxed thereon unless he charges others for riding in or using it.

The case of *Schmidt vs. Galveston, etc.*, cited with a great

deal of confidence by counsel for appellant, is under the Texas Statute, which is entirely different from the corresponding Statute of West Virginia. I have given the Texas Statute in full, and also the statute before it was amended in 1885, in the appendix to this brief. It provides that the railroad companies shall return for taxation "the whole length of their road bed and the value thereof per mile, which valuation shall include right of way, roadbed superstructure, etc.," (Sayles' Texas Civil Statutes, Sec. 4686) thus clearly providing that the superstructure shall be taxed with the roadbed. The Statute before amendment provided that "superstructure" should be construed to mean the "ties, chairs, rails, spikes, frogs and switches, whether such superstructure be laid on land or on artificial foundations." (Revised Statutes of Texas, 1879, Sec. 4686.)

This construction would seem to be broad enough to cover bridges, but as though the Legislature found this construction might exclude this character of property, when the law was amended in 1885, the language was changed so as to make the valuation include the superstructure, and the construction limiting its meaning was omitted, showing clearly that the Legislature intended the value of the superstructure, including bridges as a part thereof, to be returned and valued by the officers of the various railroad companies as a part of the mileage, with the other property of the company. In this case counsel for the appellant make no claim that the value of this bridge was included in the return made to the Auditor, but try to evade this by saying that this bridge was worth no more to the owner than the same number of feet of track. If this rule is to prevail in taxation, the farmer should pay no more on a fine horse than on a common one, because one does as much work as the other, and the man who carries a fine watch should have his property assessed no higher than the cheapest grades, because one performs the same office as the other.

This Texas decison is under a statute so different from the corresponding West Virginia Statute on the same point, as to render comparison impossible, but if it shows anything, it clearly shows that without such a statute, bridges may be assessed and taxed as separate structures in addition to the mileage of track. Even under this statute the Court held merely that "a bridge owned by a railroad company on its line of road, is properly returned for taxation as so much mileage of railroad and cannot again be taxed

as a bridge." In other words, the Court decided that a bridge is "superstructure" and taxable as such. There the State had taxed the bridge as a portion of the track, and the city of Galveston tried to again tax it as a bridge. In the present case while the Board of Public Works may have assessed a larger mileage of track than the appellant owned, it is certain that the bridge was not intentionally included in this mileage, and the error in the length—if an error was committed—was made by reason of the fact that the appellant made a false return, including the length of this bridge, but not its value, with its track, thereby deceiving the Board, for the purpose of raising the question of double taxation. The very authorities quoted by counsel for the appellant show that this same bridge was assessed, *as a bridge*, as far back as 1885, (*see P. C. C. & St. L. R'y Co. vs. Board of Public Works, supra*) therefore, when in its return of the property in 1894, it returned this bridge as mileage of track, it did so well knowing through its officers, that this return was calculated to deceive.

The Texas Statute expressly provides that the value of the superstructure *shall* be included with the value of the roadbed, while the West Virginia Statute fails to do this. In the case of *Schmidt vs. Galveston*, etc., this "superstructure" was returned and valued with the value of the road, and consequently the Court said was properly taxed, but in this case the plaintiff's bridge has never been returned for taxation at all, and therefore, it really is not taxed at all, except as a separate structure.

The only other point relied on by the appellant that I care to discuss, is the sixth and last one.

DOES THIS TAX CONSTITUTE A CLOUD ON THE PLAINTIFF'S TITLE?

This point is evidently urged to give equity jurisdiction of the subject matter. It has been repeatedly held that Courts of Equity will take jurisdiction of tax-cases where the tax complained of is unjust and improper and creates a cloud on the title to real estate, but I cannot see how a cloud on plaintiff's title to reality is created by a levy on one of its engines for the purpose of subjecting it to the payment of the tax on the plaintiff's bridge. There is no evidence in the record to show that this levy is not sufficient to pay the amount of the tax, but even were it so there is nothing in this case that would change it from the principle generally governing any other case of this character. Any adjudicated claim held by

one person against another, in one sense of the word, constitutes a lien on the property of the debtor, and to that extent creates a cloud on his property, but I cannot see that the claim of the State against the plaintiff in this case, is in any way different from other claims of the same character. It certainly will not be contended that every judgment obtained, even though unjustly, by one person against another, would entitle the injured party to resort to a court of equity for protection and relief, even though this judgment should constitute a lien on the real estate of the injured party. As stated above, the record not only fails to show any attempt on the part of the State to interfere with the control or ownership of the plaintiff's reality, but it does show that the only levy made to collect the tax in this case, was the levy on the engine, which is personal property, and which would presumptively be sufficient to satisfy the claim of the State.

The law laid down in *Dow vs. The City of Chicago, 11 Wall, 108*, has been followed by this Court ever since, and clearly states and affirms the principle that a court of equity will not interfere to restrain the collection of taxes on the sole ground that the taxes are illegal. "There must exist in addition special circumstances, bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud on the title of the complainant."

Mr. Justice Field, in delivering the opinion of the Court, in this case, refers approvingly to the case of *Cook County vs. C. B. & Q. R. R. Co., 35 Ill., 365*, in which it is held that "a court of equity would never entertain a bill to restrain the collection of a tax, except in cases where the tax was unauthorized by law, or where it was assessed upon property not subject to taxation," and that even in such cases, jurisdiction would not be taken, "without special circumstances showing that the collection of the tax would be likely to produce irreparable injury or cause a multitude of suits."

This decision was closely followed in *Hannewinkle vs. Georgetown, 15 Wall, 557*.

In the case of *Union Pacific Railway Company vs. Cheyenne (113 U. S. 516)*, the same doctrine was sustained, and while in that case the Court took jurisdiction, on the ground that the collection of the taxes complained of would create a cloud upon the title of

the complainant to the real estate upon which the tax was assessed, the case is so different from the one involved in this suit, that it would scarcely admit of comparison. In the opinion, the learned Judge says; "It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been susteined. But it is well settled that there ought to be some equitable ground for the relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the tax-payer's lands, the loss of his freehold by means of a tax sale, would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such sale could be made, would be a grievance which would entitle him to go into a Court of Equity for relief.

This is the strongest case I have been able to find in favor of the appellant's contention, and I have quoted from it at length to call attention to the fact that the principles upon which the decision is based, do not apply in the present instance, and the opinion of the Court clearly shows that cases such as appellant makes here, are excluded from the rule under which this case was decided.

In this case (*Union Pacific Railway Company vs. Cheyenne, supra,*) the matter involved was a tax levied on a number of lots in the city of Cheyenne, which had been laid out by the complainant and offered for sale, and as all the property of the complainant including these lots, had already been assessed for taxation by the Board of Equalization, and the levy of this city tax would be double taxation and operated so as to prevent a sale of the lots, under the circumstances, and for the further reason that the plaintiff had no legal remedy without the bringing of a large number of suits to recover back from the city the taxes piad, the Court held that in this case equity would take jurisdiction and inhibit and restrain the collection of this tax. None of these circumstances are shown in the present case. Complainant will not contend that it would require a number of actions to settle this matter in the courts of law, and certainly will not contend that it is prevented from making sale of its property by reason of the cloud created by this tax.

The principles laid down in the *Union Pacific Railway Company vs. Cheyenne*, are followed by the State Courts of West Virginia. In the case of the *C. & O. R. R. Co. vs. Miller, 19 West Virginia, 416*, the Court says, "The right to sue a State officer when the State cannot be sued, either to require or to inhibit a ministerial duty, has been repeatedly recognized," and cites a number of authorities to sustain this proposition. This we think is certainly the law and the only trouble the complainant has is that the principles laid down in the cases quoted from do not apply in its case.

SHOULD A COURT OF EQUITY TAKE JURISDICTION?

It is very seldom that courts of equity interfere in cases involving the collection of taxes, and only when for some special reason, as in the case of the *Union Pacific Railway Company vs. Cheyenne--supra*, where the necessities of the case almost demand the intervention of courts of this character. This rule is most clearly and positively stated in R. R. tax cases, *2 Otto 92 U. S. 575*. The Court says, "While this Court does not lay down any absolute rule limiting the powers of a court of equity in restraining the collection of taxes, it declares that it is essential that every case be brought within some recognized rules of equity jurisdiction, and that neither illegality nor irregularity in the proceedings, nor error, nor the hardship nor injustice of the law, provided it be constitutional, nor any grievances which can be remedied by a suit at law, either before or after payment of taxes, will authorize an injunction against its collection." Applying these principles to the present case, there is nothing in the complainant's bill with the exception of the bare statement that the assessment of this tax creates a cloud on the complainant's title to realty, which question I have discussed above, that would give a court of equity jurisdiction. In order that this jurisdiction should attach, it is necessary not only that the tax should be illegal, but that there should be no adequate remedy at law by which the complainant could be relieved from the effects of this illegal tax. Associate counsel in the brief filed in this case, have I think, clearly shown that the plaintiff had a full and complete remedy provided in the West Virginia Statutes. Chapter 39, section 67, Code of 1891, provides that after the Board of Public Works assesses the value of railroad property within the State, the Auditor shall notify the officers of the road of this assessment, and the decision of the said

Board upon this question shall be final and binding, unless the same be appealed from within 30 days after such decision comes to the knowledge of the President, Vice-President, Secretary or principal accounting officer, or the attorney of the corporation or company transacting business for it in the county wherein the seat of government is, etc. The same Statute further provides the manner in which the appeal may be taken by the Company complaining of the assessment from the decision of the Board of Public Works. This appeal shall be made to the circuit court of any county through which its road runs, and where the property improperly assessed is situated, and such appeal shall have precedence over all other cases in the court. It further provides, "The court shall hear all such legal evidence on such appeal as may be offered by the State, county, district or municipal corporation, and by the corporation or company taking such appeal."

The complainant attempts to evade this law by saying that it received no notice of this assessment until the 19th day of January, 1895, and that as these taxes were payable on the 20th of January, 1895, in order that the complainant should be entitled to the discount of 2½ per cent. on the same, that it had no time within which to make this appeal provided for in this section, and therefore was without legal remedy. This may all be admitted, and still the plaintiff would not be entitled to the relief asked. In the language of the case above referred to—*R. R. Tax Cases, supra* "neither illegality or irregularity in the proceedings, nor error or excess in the valuation, nor the hardship or injustice of the law, provided it is constitutional," will authorize an injunction to restrain the collection of the tax. The most that can be said in this case—even admitting plaintiff's contention on this point to be true—is that the law is unjust and that it suffered a hardship by reason of this unjust law. I have not considered the argument of counsel for the appellant that this law is unconstitutional, for the reason that the appellant has cited no authority in support of this proposition, and the question has been fully and ably presented by my associates. In addition to these reasons I will add that the Supreme Court of West Virginia in the case of *Wheeling Bridge & Terminal Railway Company vs. Paull—39 West Va. 142*—has decided that this law is not in conflict with the State Constitution, and while the contention of the plaintiff is that it violates the Federal Constitution, this decision is exactly in point, for that part of the Fourteenth Amendment of the Federal Constitution upon

which the plaintiff relies, is copied *verbatim* in the State Constitution. (*See Const. of West Va., Art. III, Sec. 10.*)

But even if the action of the Board of Public Works—or of the Auditor—prevented the plaintiff from exercising its legal remedy before this tax was levied, it still has a legal remedy by paying this tax, and then suing the State or officer to whom it was paid in the United States Court, as it has brought this suit, or by suing the officer to whom it was paid in the State courts. These remedies were, and are certainly open to the plaintiff if it desired to avail itself of them, and it is well settled that a court of equity will not interfere by injunction to restrain the collection of a tax when the complainant has a legal remedy either before or after the payment of the tax, (*see R. R. Tax Cases, Supra*). There can be no question that the plaintiff could have brought his action in the Federal Courts, either against the State of West Virginia, or the officer collecting the tax, to receive back the erroneous taxes paid, and it has been decided by the Supreme Court of West Virginia (*C. & O. Railway Co. vs. Miller, supra*) that such an action may be maintained in the State Courts against the officer, although no suit can be brought in those Courts against the State.

If the plaintiff has, or had, a remedy at law, a court of equity will compel him to seek and rely upon it. Injunction is an extraordinary remedy, and only to be resorted to when other remedies fail. The prompt payment of taxes is necessary for the welfare of every State, and should be enforced by the Courts.

Most respectfully submitted,

EDGAR P. RUCKER,
Attorney General.

REVISED STATUTES OF TEXAS, 1879.

Art. 4686. "It shall be the duty of every railroad corporation in this State to deliver a sworn statement, on or before the first day of June in each year, to the assessor of each county and corporated town into which any part of their road shall run, or in which they own or are in possession of real estate, a classified list of all real estate owned or in possession of said company in said county or town, specifying—

1. The whole number of acres of land owned, possessed or appropriated for their use, with a valuation affixed to the same.

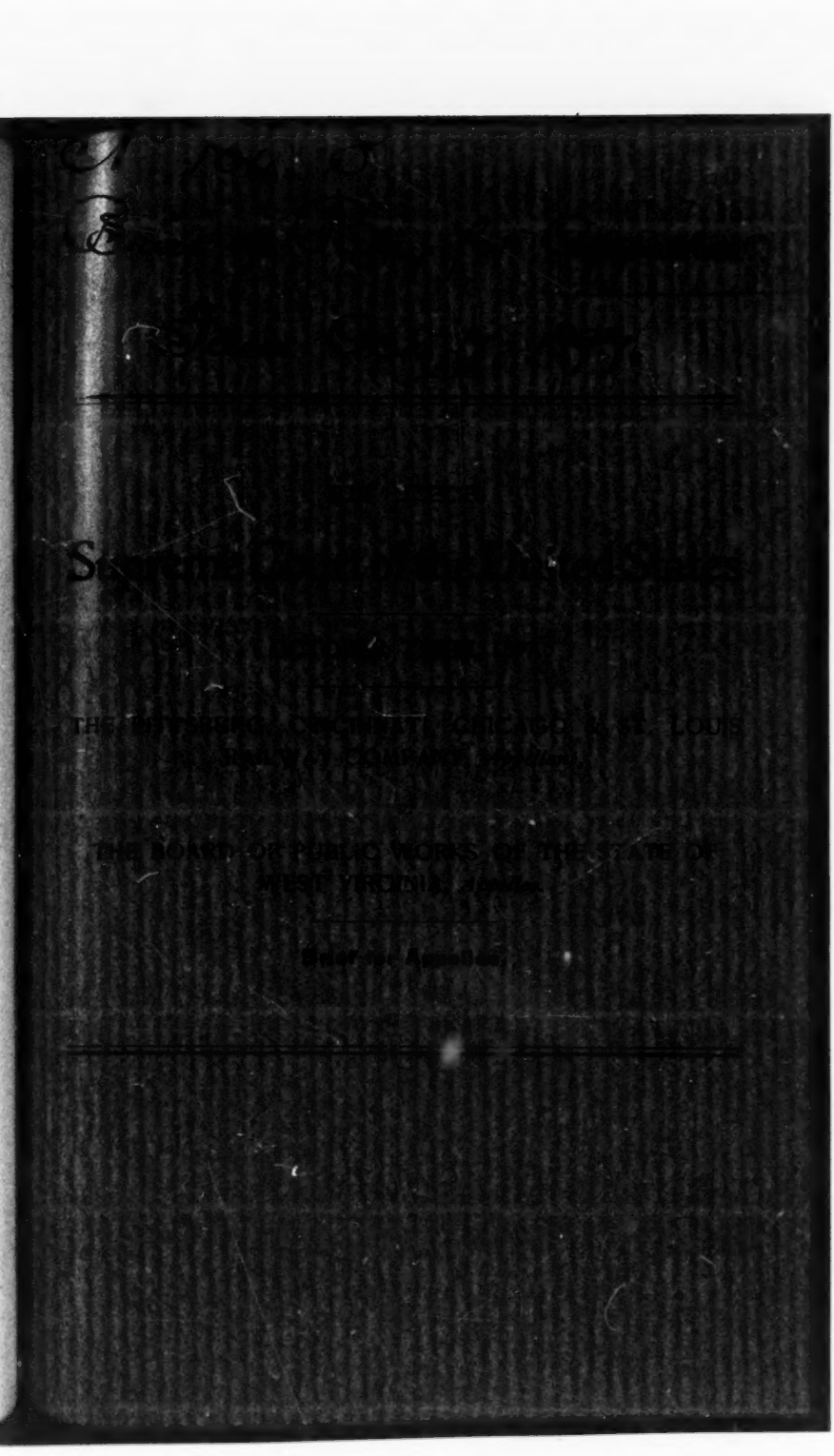
2. The whole length of their superstructure and value thereof; and construing "superstructure" to mean the ties, chairs, ralls, spikes, frogs and switches, whether such superstructure be laid on land or on artificial foundations.

3. The buildings, machinery and tools therein belonging to the company or in their possession, describing them by location, with the estimated value."

SAYLES' TEXAS CIVIL STATUTES.

Art. 4678. "RAILROADS, TELEGRAPHS, ETC. All railroad, telegraph, plank road and turnpike companies, shall list all of their real and personal property, giving the number of miles of road-bed and line in the county where such road-bed and line is situated, at the full and true value, except when such company may own personal property or real estate in an unorganized county or district, then they shall list such property to the comptroller." (Act August 21, 1876; 15 Leg. p. 275.)

Art. 4686. "RENDITION BY RAILROADS. It shall be the duty of every railroad corporation in this State, to deliver a sworn statement, on or before the first day of June of each year, to the assessor of each county and incorporated city or town, into or through which any part of their road may run, or in which they own or are in possession of real estate, a classified list of all real estate owned by or in possession of said company in said county, town, or city, specifying; 1st., the whole number of acres of land, lot or lots, exclusive of their right of way and depot grounds owned, possessed or appropriated for their use, with a valuation affixed to the same; 2nd, the whole length of their road-bed and the value thereof per mile, which valuation shall include right of way, road-bed, superstructure, depots and grounds upon which said depots are situated, and all shops and fixtures of every kind used in operating said road; 3rd, all personal property of whatsoever kind or character, except the rolling stock belonging to the company or in their possession in each respective county, listing and describing the said personal property in the same manner as is now required of citizens of this State." (Amendment March 28th, June 30th. 1885; 19 Leg. p. 61.)



IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

THE PITTSBURG, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, *Appellant*,

v.

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA, *Appellee*.

Brief for Appellee.

The principal question here involved relates to the right of the State of West Virginia to assess and collect, for its own and for County, District and School District purposes, a yearly tax upon the railroad bridge spanning the Ohio River in Brooke County, owned and used by the appellant. Our contention is that it is properly taxable as a building or structure, at a value ascertained under the law, and is not to be taxed, as claimed by the company, simply as a portion of the railroad track, upon a valuation corresponding to other portions thereof.

The statutory provisions governing tax assessments upon railroad property are found in Code of West Virginia, chapter 29, sec. 67. These are practically a transcript of the Act of the Legislature, passed February 22, 1883. This section will be printed and attached hereto.

It will be observed that West Virginia has adopted the plan of assessment in use in several of the other states, as far as concerns the real estate of railroad corporations. Such property is separately assessed in the county in which it is situated and the tax, when collected, is distributed, the state, county and sub-divisions each receiving its ascertained proportion. This system is of long standing, the act of December 3, 1863 (Acts of the Legislature, 1863, ch. 118, section 52) having provided that the president, secretary or principal ac-

counting officer of every railroad company shall return, with a view to taxation, "the proportional value of all locomotives and other rolling stock, and the value of all other personal and movable property, money and credits shall be added to the stationary and fixed property and real estate and shall be apportioned by such officer to each county through which the road passes pro rata, in proportion to the fixed property and real estate belonging to the company in such county; and all property so listed shall be subject to pay the same taxes as other property listed in such county. Said officer shall, on or before the first day of April in each year, make out and return such pro rata valuation of the real and personal property, and money and credits of such company, in the several counties through which such railroad passes."

This view may not be acceded to by the learned counsel opposed. It has been contended that if there is any distinction between systems, the one which in this state obtains is essentially the unit system. But this must be founded upon a misconception. It is true that under the paragraph of sec. 67, designated as the second, the appellant is required to return the number of miles of road without the state as well as within, but this has relation to taxes upon rolling stock and not upon real estate. The third is one affecting the latter and it limits as to locality; and so as to the fifth. The property "in each county" is to be returned. The board of public works, under paragraph eight, is directed to "assess and fix the fair cash value of all the property of said corporation or company * * in each county in which the railroad of any such corporation or company runs." Appeals are allowed from decisions of the board "as to the assessment and valuation made within each county through which its road runs, to the circuit court of such county." These and other provisions would be inappropriate under the unit plan. Palpably, we think it was contemplated that each county should have the benefit of taxes upon the property within its limits.

The system of taxing by counties has been recognized as a proper one by state decisions. The Mohawk &c. v. Clute, 4 Paige 384; Railroad v. Town, 16 Barb. 244; Tax Cases, 12 Gill & J. 118, 153; Providence v. Wright, 2 R. I. 459; People v. Railroad Co., 34 Cal. 656; Sangammon &c. v. County of Morgan, 14 Ills. 163; Huntington v. C. P. R. R. Co., 2 Sawyer 510, 511.

This court has recognized the right of the several states to exercise a discretion as to principles and methods. Thompson v. Pacific &c.,

9 Wall. 579, 591; State Tax Cases, 15 Id. 319; Delaware Tax Cases, 18 Id. 208, 231; Home Ins. Co. v. New York, 134 U. S. 594.

It may be that in states which have the unit system there can be no severance or dislocation of a part, a station house or bridge, for illustration. But it is otherwise where the property is taxed as belonging to a given locality or political subdivision. In the latter case, taxation as a whole, with apportionment, is impracticable; and the decisions in such states lack pertinency.

The third paragraph contemplates a return of the railroad track in each county. The fifth relates to other real estate. We quote:

"Fifth. Its depots, station houses, freight houses, machine and repair shops and machinery therein, and all other buildings, structures and appendages connected thereto or used therewith, together with all other real estate other than its railroad track, owned or used by it in connection with its railroad, and not otherwise taxed, including telegraph lines owned or used by it, and the fair cash value of all buildings and structures, and all machinery and appendages and of each parcel of such real estate, including such telegraph line, and the cash value thereof in each county in this state in which it is located."

This expressly requires a return of all buildings and structures belonging to the corporation affected. The words employed include the bridges of the company, certainly any bridge over the Ohio river. That a railroad bridge is a building or structure is evident. Under any of the definitions, it is either a building or a structure, in some, one of the words being used and in some, the other. Jacob, Law Dict.; Bouvier, Law Dict.; Bridge Proprietors v. Hoboken Co., 1 Wall. 147, 148; Chicago &c. R. Co. v. Sabula, 19 Fed. Rep. 180; Enfield v. Hartford, 17 Conn. 56; Tolland v. Willington, 26 Id. 582; Whitall v. Freeholders, 40 N. J. L. 305. And the bridge in question is declared to be a "lawful structure" by Act of Congress of July 14, 1862. 12 U. S. Statutes at Large, 569.

No difficulty seems to have been experienced in sustaining the separate taxation of bridges where the local or county plan prevails. Cass Co. v. C. B. & Q. R. Co., 25 Neb. 348; Providence v. Wright, 2 R. I. 459. And see, State v. Mutchler, 42 N. J. L. 461. In Appeal &c. v. Western Maryland &c., 50 Md. 276, it was held that a tunnel was not properly taxable, but upon the ground solely that a special statute had expressly provided against the taxation of bridges and tunnels. We may assume that the decision would have been different, if general principles had been applied.

The statute may not be happily worded, yet its meaning is reasonably clear. "All other buildings and structures" are words of general import intended to cover and include any property of that class not specifically mentioned; and "appendages" relates to such other buildings and structures. Transposing slightly, we may read it thus: Its depots, station houses, freight houses, machine and repair shops, and all its other buildings and structures, together with the machinery in such machine and repair shops and the appendages connected or used with such buildings and structures. The correctness of this rendering appears from the text itself; and is further evidenced by the succeeding clause providing for a report of the "fair cash value of all buildings and structures and all such machinery and appendages." Nor do we regard it as significant that bridges are not specifically mentioned. Using words of general description, it was no more necessary for the legislature to include them in terms than it was to mention water tanks, car houses and towers, all of which appear in exhibit A of bill as property properly the subject of assessment.

The bill sets up that the bridge has no greater earning capacity than so much ordinary track. We had not supposed that this is the criterion of value. Taxation of real property does not depend upon profits or wholly upon present use. "The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it." This is quoted approvingly in P. C. C. & St. L. Co. v. Backus, 154 U. S. 421. The board is empowered to "fix the fair cash value of all the property of said corporation." The cash value of the bridge is not rated by its capacity to make profits under existing circumstances. Unlike tunnels and ordinary bridges, it would have a large pecuniary value if the railroad track were to be removed. It could be readily turned into a highway for the use of travelers and shippers of freight. Its abutments, certainly, could be used for different purposes. The materials would be valuable even if displaced. The right to have and maintain such a structure has a value.

It has been contended that there was a failure of the board to tax other bridges of the appellant and that this militates against the assessment. Several replies occur: 1. The bill is silent on this head. 2. No bridges having been returned, it is not to be assumed that the board had knowledge of their existence. 3. Such failure is something of which complaint cannot be made, for the reason that the plaintiff was itself in fault, and for the further reason that it was not

prejudiced by the omission. It would be something novel to strike down an assessment on certain property because other property has been overlooked. 4. It will not be pretended that there is any bridge over the Ohio, belonging to the plaintiff, other than the one assessed. Its ordinary bridges may be subject to taxation, but if so, with greater reason is this one thus affected, it spanning a navigable river and having been erected and being now maintained under the authority of the general government, unlike such others, the ownership of which is consequent upon condemnation or purchase.

A case has heretofore been cited for the plaintiff on this branch—Schmidt v. Galveston &c. (Texas) 24 S. W. Rep. 546. We have not been able to examine the Texas statute and doubt whether the decision is authority outside of the state. The court was of opinion that the bridge was properly taxed as mileage. We infer from this that the two statutes differ. And estoppel seems to have been an element. It is not seen that it is so here.

The power to assess the tax complained of seems clear under the quoted paragraph. But without this, it is believed that it exists. Concededly, the railroad track may be assessed by the mile at a fair valuation. In effect, this may be said to have been done in this instance. The company returned its main track at a valuation of 13,000 dollars per mile. The board added 200,000 dollars for so much of the railroad bridge as is within the state. If it had fixed the valuation at, say 42,000 dollars per mile of track, the result would have been about the same, so far as the amount of tax is concerned. Assuming that the valuation on the bridge was not excessive, and there is no charge to that effect, it might well have been distributed over the 7.11 miles of main track within this state. The method adopted, even if irregular, would not seriously affect the assessment. The plaintiff would not be prejudiced by the inadvertence. Robertson v. Anderson, 57 Iowa, 165.

And still again: If by the words "railroad track" the track proper is meant, that is to say, the rails and ties in position, then the bridge and land upon which they rest would be liable to taxation under the fifth paragraph, which provides not only for the return of buildings and structures, but of "all other real estate other than its railroad track, owned or used by it in connection with its railroad and not otherwise taxed." In almost any view, the tax is authorized. The constitution of the state directs that "all property, both real and personal, shall be taxed in proportion to its value." Art. 10 Sec. 1. The

legislature will be presumed to have had this direction in mind, and to have intended the return and assessment of all the property of railroad corporations. It had no power to exempt any portion, and it did not attempt to exercise such power. On the contrary, all idea of omission or exemption is precluded by the words employed.

The bill does not show that the action of the board was new or novel. The case of P. C. C. & St. L. R. Co. v. Board, 28 W. Va. 264, which will probably be cited by opposing counsel, but which can have but little application here, as we imagine, indicates similar action as far back as 1885. The scope and methods of taxation have not undergone material change for many years. We may therefore assume that this and other railroad bridges over the Ohio have been assessed for a long period, if not for a period corresponding to the history of the state. We suggest that the doctrine of practical interpretation may be invoked. To quote from the opinion in Erie &c. v. Pennsylvania, 21 Wall. 498: "We see no such difficulty in the machinery for the collection of the tax as should make us doubt the intention of the legislature. That, in fact, the state at once proceeded to, and has constantly persisted in its exercise, affords strong evidence of its intention and of its undrstanding of its effect."

There are other matters alluded to in plaintiff's bill which, it may be urged, militate against the validity of the tax. We notice them briefly.

Double Taxation.

It is understood that the opposing claim is to the effect that the bridge, or so much as is within the state, was returned as a portion of the track; that it was taxed as such portion and also as a building or structure, upon a specific valuation; and that such taxation should be relieved against because double in its nature, even if the bridge was subject to specific taxation. Regarding this, several suggestions occur:

1. If there was error, the responsibility rests largely upon the company. In its return, it gave 7.11 miles of main track, omitting all reference to the bridge. The board accepted the return, but added the West Virginia portion of the bridge. It being liable to taxation, it should have been returned, the length being stated, and then the board could have acted advisedly, and no inadvertence would have resulted. The silence of the railroad officials prevented any reduction of the mileage, if a reduction should have been made.

2. Still assuming such liability, we submit that it was the duty of the company to pay, or tender, the taxes legally due—those upon the bridge and track, less, perhaps 1,518 feet of the latter. Railroad Tax Cases, 92 U. S. 576, 616. It would be inequitable to relieve against 3,060 dollars of legal taxes because of a mistake of less than 100 dollars. The proper sum to be paid or tendered could have been readily ascertained. At all events, some figures could have been named, some disposition to pay manifested. The auditor was under no obligations to make out separate bills or statements. The taxpayer is the one to decide how much of the presented account he is willing to pay. The plaintiff did decide in this instance, but did not tender all that was legally due.

3. The remedy was an appeal to the circuit court of the county. Appendix, p. 3. This right of appeal has been sanctioned. Wheeling &c. v. Paull, 39 W. Va. 142. This remedy is simple, inexpensive, and adequate, and should have been invoked. It was not, and the company is concluded.

4. The statute points out another method of correction. Application should have been made to the auditor for a rectification of the mistake, and none having been made, an injunction from a state court would not lie. Appendix, p. 5. There seems to be no good reason why the rule prescribed, it being a proper one, should not have been followed here.

5. Should the foregoing propositions be resolved against us, we suggest that an injunction would not lie for more than the excess—the tax on the 1518 feet of track.

Failure to Notify.

How the alleged failure of the defendants to give notice of the amount of taxes or the manner of assessment can be used effectively as a defense does not appear. It is admitted in the bill that such notice was received on the 19th of January next following the assessment. This was sufficient for any and all purposes.

1. Apparently, it is supposed that it is made the duty of the state officials to give such notice immediately after the board takes action. This theory seems founded on a misconception. It is believed that there is no such direction in the law. The board, after it procures the needed information, ascertains the taxable property and fixes values (Appendix, p. 3); after which the auditor certifies the result to the clerks of the courts of the different counties in which the property is situated and the values are then by the county courts appor-

tioned among the subdivisions of the county. Within thirty days after such apportionment it is certified to the auditor with the amount levied by the court upon each one hundred dollars' worth of property. Appendix p. 4. These and other provisions found in the statute require time—months, presumably. And a latitude is allowed. "As soon as possible" after the value is fixed and necessary information obtained, the auditor makes the assessment; and "as soon as possible," makes out and transmits a statement of the taxes so assessed or charged to one of the named officers of the corporation. Appendix, p. 5. No other notice is contemplated or needed. We may take it that the state officers performed their duty in this regard and in proper time, and especially as there is no averment in the bill charging fraud or dereliction of duty or even intimating that the auditor or other officer was or could have been able to give the requested information before it was in fact given.

2. The plaintiff was not injured by the failure.

The right of appeal is secured by the code and can not be affected by delay on the part of the auditor. An appeal can always be taken "within thirty days after such decision (as to value) comes to the knowledge of the president" or other named corporation official. Appendix, p. 3. Let it be that no notification was received until January 19, 1895. The plaintiff had thirty days thereafter in which to take the matter to the circuit court.

There was ample time for payment, and this, without reference to the appeal, which, if taken, would have postponed the day of settlement. The plaintiff found time and opportunity to pay the greater portion of the taxes before any levy was made or penalty added. And as to the remaining portion, its refusal to either pay or appeal precludes the defense of want of time.

Notice of the action regarding the bridge was not essential to the validity of the tax. State Railroad Cases, 92 U. S. 576.

Due Process of Law.

It is now claimed that the statute is unconstitutional, because it conflicts with the Fourteenth Amendment of the Federal Constitution. This constitutes no feature of the bill and for that reason will hardly be considered at the hearing.

If we are to judge from former arguments the specifications will probably be: 1. No state judicial tribunal exists which is empowered to hear and determine questions relating to taxes on railroad property. 2. Railroad corporations have no opportunity to be heard upon such

questions, except through their returns to the auditor. Of these, in their order:

1. We had not supposed that a hearing before a court, or opportunity for such a hearing, is essential to the validity of taxes. The contrary is believed to be the holding everywhere. McMillan v. Anderson, 95 U. S. 41; Kelly v. Pittsburgh, 104 U. S. 78. We quote from the opinion of Mr. Justice Miller in the latter: "Taxes have not as a rule, in this country since its independence nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to the matter, is, and always has been, due process of law."

2. Two replies occur. One is, that the statute does contemplate a hearing before the board, if one is desired. That tribunal is to consider any return made to the auditor and all the evidence and information furnished or obtained in the manner pointed out in the preceding portion of the enactment, together with "all such as may be offered by such corporation or company." This is sufficient. Under this, notice is required; certainly, may be demanded. And there is no averment in the pleadings that notice was not given, or that opportunity was withheld. The second is, that a full opportunity for a hearing is afforded by the appeal to the circuit court. Upon such an appeal the matters are fully heard. All proper evidence is to be considered, including such as is offered by the company appealing. Under all the decisions, this secures all legal rights, and is due process even if the proceedings before the board were not. Davidson v. New Orleans, 96 U. S. 97, 104; Hagar v. Reclamation District, 111 U. S. 701, 710.

Interstate Commerce.

We content ourselves with the statement that we regard the law as well settled by repeated decisions. A corporation doing an interstate business may not, perhaps, be taxed upon such business; but land and other property owned by it, situated in a given state, may well be taxed by such state, however the property may be employed. Ratterman v. W. U. T. Co., 127 U. S. 411; W. U. T.. C.. v. Mass., 125 Id. 530; Shelton v. Platt, 139 Id. 591; Henderson B. Co. v. City of Henderson, 141 Id. 679; Ficklin v. Taxing District, 145 Id. 1.

Courts will not ordinarily interfere with the collection of a tax.

To adopt the language of Mr. Justice Field, in Dows v. The City of Chicago, 11 Wall. 110: "It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom is involved the duty of collecting the taxes, may derange the operations of government and thereby cause serious detriment to the public." It may be questioned whether anything has been shown or urged warranting the interposition of a court of equity. In any event, the leaning will be in favor of the enactment and of the action of the taxing officers.

The importance of the question to the state, and especially to the local divisions in which railroad bridges over the Ohio river are situated, will at once be perceived. To strike down the taxes on such bridges, all of them constituting valuable property, would serve to hamper and derange financial affairs, thus affecting injuriously the public interests. To uphold them, would, in our judgment, not only avoid confusion and inconvenience, but would accord both with the letter and the spirit of the constitution of the state.

Respectfully submitted,

T. S. RILEY,

TH. MELVIN,

for Defendant.

APPENDIX.

Code of West Virginia, Chapter 29, Section 67.

"67. The president, vice president, secretary or principal accounting officers of any corporation or company owning or operating a railroad or railway, wholly or in part within this State, for the transportation of freight, or passengers, or both, for compensation, shall make a return in writing to the auditor on or before the first day of April in each year, which shall be signed and sworn to by one of said officers, showing in detail the following particulars for the year ending on the thirty-first day of December, next preceding, viz:

First. The whole number of miles of railroad owned, operated or leased by such corporation or company within this State.

Second. If such road so owned, operated or leased by such corporation or company be partly within and partly without this State, the whole number of miles thereof within this State, and the whole number of miles without the same, including its branches in and out of the State.

Third. Its railroad track in each county in this State through which it runs; giving the whole number of miles of road in the county, including the track and its branches, and side and second tracks, switches and turnouts therein, and the fair cash value per mile of such railroad in each county, including in such valuation such main track, branches, side and second tracks, switches and turnouts.

Fourth. All its rolling stock; giving a detailed statement of the number of cars, including passenger, mail, express, baggage, freight and other cars of every description, and the fair cash value of all such cars used wholly, or in part, in this State, distinguishing between such as are used wholly in this state and such as are used partly within and partly without the State; the whole number of engines, including their appendages used wholly or in part within this State, distinguishing between such as are used wholly within this State and such as are used partly within and partly without the same, and the fair cash value of such as are used wholly within the State, and such as are used partly within and partly without the State; and the proportional value of such cars and engines used by it partly within and partly without the State, according to the time used and the number of miles run by such cars and engines in and out of the State; and the proportional cash value thereof to each county in this State within which such railroad runs.

Fifth. Its depots, station houses, freight houses, machine and repair shops and machinery therein, and all other buildings, structures

and appendages connected thereto or used therewith, together with all other real estate other than its railroad track, owned or used by it in connection with its railroad, and not otherwise taxed, including telegraph lines owned or used by it, and the fair cash value of all buildings and structures, and all such machinery and appendages, and of each parcel of such real estate, including such telegraph line, and the cash value thereof in each county in this State in which it is located.

Sixth. Its personal property of every kind whatsoever including money, credits and investments, wholly held or used in this State, showing the amount and value thereof in each county.

Seventh. Its actual capital stock and the number, amount and value in cash, of the shares thereof; the amount of its capital stock actually paid in; the total amount of its bonded indebtedness, and of its indebtedness not bonded; its gross earnings for the year, including its earnings from its telegraph lines, which shall be stated separately, on the whole length of its road, including the branches thereof, in and out of the State, and also such earnings within this State on way freight and passengers, and the proportion of such earnings in this State on through freight and passengers carried over its lines in and out of the State, to be ascertained by the number of miles the same were carried by it within and the number of miles without the State.

Eighth. Its gross expenditures for the year, giving a detailed statement thereof under each class or head of expenditure. If any corporation or company fail to make such return to the auditor as herein required, it shall be guilty of a misdemeanor and fined one thousand dollars for each month such failure continues. Prosecutions for such failure shall be in the county wherein the seat of government is. If such return be made to the auditor, he shall lay the same, as soon as practicable thereafter, before the board of public works, and if such return be satisfactory to the board it shall approve the same, and by an order entered upon its records, direct the auditor to assess the property of such corporation or company, with taxes, and he shall thereupon assess the same as hereinafter provided. But if such return be not satisfactory to the board, or if any such company fail to make such return as herein required, said board of public works shall proceed in such manner as to it may seem best to obtain the facts and information required to be furnished by such return; and to this end the said board may send for persons and papers, and may compel the attendance of any person and the production of any paper necessary, in the opinion of said board, to enable it to obtain the information de-

sired for the proper discharge of its duties under this section. Any expenses necessarily incurred by said board in procuring such information shall be paid by the governor out of the contingent fund. If any person shall refuse to appear before said board when required by it to do so, as aforesaid, or shall refuse to testify before said board in regard to any matter as to which said board may require him to testify, or if any person shall refuse to produce any paper in his possession or under his control, which said board may require him to produce, every such person shall be guilty of a misdemeanor, and fined five hundred dollars and shall be imprisoned not less than one nor more than six months, at the discretion of the court. Prosecutions against any such person shall also be in the county wherein the seat of government is. As soon as possible after the board of public works shall have procured the necessary information to enable it to do so, said board shall proceed to assess and fix the fair cash value of all the property of said corporation or company hereinbefore required to be returned by it to the auditor, so far as the said board has been able to ascertain the same, in each county through which the railroad of any such corporation or company runs. In ascertaining such value the board shall consider any return which may have been previously made to the auditor by such corporation or company, and all the evidence and information it has been able to procure by the means aforesaid, and all such as may be offered by such corporation or company. And the decision of said board thereon made shall be final, unless the same be appealed from within thirty days after such decision comes to the knowledge of the president, vice president, secretary or principal accounting officer, or the attorney of such corporation or company transacting business for it in the county wherein the seat of government is, in the manner following. Any corporation or company claiming to be aggrieved by any such decision, may within the time aforesaid, appeal therefrom as to the assessment and valuation made within each county through which its road runs, to the circuit court of such county; and such appeal shall have precedence over all other cases on the docket of such court, and be tried in the shortest time possible after such appeal is docketed. The court shall hear all such legal evidence on such appeal as may be offered by the State, county, district or municipal corporation, and by the corporation or company taking such appeal. And if the court be satisfied that the value so fixed is correct, it shall confirm the same; but if it be satisfied that the value so fixed by said board is either too high or too

low, the court shall correct the valuation so made and ascertain and fix the true value of such property according to the facts proved, and certify such value to the auditor. In case the lists and valuations of the property filed with the auditor as aforesaid, be satisfactory to the board of public works, and in cases where an assessment of the property of such company is made by the board of public works as aforesaid, the auditor shall immediately certify to the county court of each county through which such railroad runs, the value of the property therein of every such company as valued or assessed as aforesaid, and it shall be the duty of such court to apportion the whole of such value between such districts and independent school districts in their county through which said road runs, as near as may be according to the value thereof, and then a proportional valuation to each municipal corporation in their county through which said road runs according to the value thereof. It shall be the duty of the clerk of the county court of every county through which any railroad runs, within thirty days after the county and district levies are laid by such court to certify to the auditor the apportionment made by the county court as aforesaid, and the amount levied upon each one hundred dollars' value of the property in the county for county purposes, and on the value of the property in each magisterial district through which such railroad is located, for district purposes. It shall also be the duty of the secretary of the board of education of every school district and independent school district through which the railroad runs, in each county, within thirty days after the levy is laid therein for free school and building purposes, or either, to certify to the auditor the amount so levied on each one hundred dollars' value of the property therein for each of said purposes, and it shall be the duty of the recorder, clerk or other recording officer of every municipal corporation, through which such railroad runs, within the same time after a levy is laid therein for any of the purposes authorized by law, to certify to the auditor the amount levied upon each one hundred dollars' value of the property therein for each and every purpose. Any clerk of a county court, secretary of a board of education, or recorder, clerk or other recording officer of a municipal corporation, who shall fail to perform any of the duties herein required of him, shall be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars. In case of the failure of any such officer to furnish to the auditor the certificate herein required, the auditor may obtain the rate of taxation for any of said purposes from the copies of land books on file in his office, if

the same be found in such books, if not, in such other way or manner as he may deem necessary or proper for the purpose. As soon as possible after the value of the property of such corporation or company is fixed by the board of public works, or by the circuit court on appeal as aforesaid, and after he shall have obtained the information herein provided for to enable him to do so, the auditor shall assess and charge the property of every such corporation or company with the taxes properly chargeable thereon, in a book to be kept by him for that purpose, as follows:

First. With the whole amount of taxes upon its property for state and state school purposes.

Second. With the whole amount of taxes on its property, in each county through which its road runs, for county purposes.

Third. With the whole amount of taxes on its property in each magisterial district through which its road runs, for road and other district purposes other than free school and building purposes.

Fourth. With the whole amount of taxes on its property in each school district and independent school district through which its road runs, for free school and building purposes; and

Fifth. With the whole amount of its taxes on its property in each municipal corporation through which its road runs, for each and all of the purposes for which a levy therein is made by the municipal authorities of such corporation. And no injunction shall be awarded by any court or judge to restrain the collection of the taxes or any part of them so assessed, except upon the ground that the assessment thereof was in violation of the constitution of the United States, or of this State, or that the same were fraudulently assessed, or that there was a mistake made by the auditor in the amount of taxes properly chargeable on the property of said corporation or company; and in the latter case no such injunction shall be awarded unless application be first made to the auditor to correct the mistake claimed, and the auditor shall refuse to do so, which facts shall be stated in the bill. The auditor shall, as soon as possible, after he completes the said assessments, make out and transmit by mail or otherwise, a statement of all taxes and levies so charged to the president, vice president, secretary or principal accounting officer of such corporation or company and it shall be the duty of such corporation or company so assessed and charged, to pay the whole amount of such taxes and levies upon its property, into the treasury of the State, by the twentieth day of January next after the assessment thereof, subject to a deduction of 2½ per centum upon the whole sum if the same be paid on

or before that day. If any such corporation or company fail to pay such taxes and levies by the said twentieth day of January, the auditor shall add ten per centum to the amount thereof, to pay the expenses of collecting the same, and shall certify to the sheriff of each county the amount of such taxes and levies assessed within his county; and it shall be the duty of every such sheriff to collect and account for such taxes and levies in the same manner as other taxes and levies are collected and accounted for by him. And when the district and independent school district taxes and levies are collected by him, he shall immediately pay the same to the treasurer of the proper district. Neither the county court of any county, nor any tribunal acting in any county in lieu of a county court, or otherwise, nor any board of education, nor the municipal authorities of any incorporated city, town or village, shall have jurisdiction, power or authority, by compromise or otherwise, to remit or release any portion of the taxes or levies so assessed upon the property of any such corporation or company; and when such taxes and levies are certified to the sheriff of any county for collection, as aforesaid, it shall be his duty to collect the whole thereof, regardless of any order or direction of any such county court, tribunal, board of education or municipal authority to the contrary; and if he fail to do so, he and his securities on his official bond shall, unless he be restrained or prohibited from so doing by legal process from some court having jurisdiction to issue the same, be liable thereon for the amount of said taxes and levies he may so fail to collect, if he could have collected the same by the use of due diligence. Any member of a county court, or tribunal acting in lieu thereof, or of a board of education, or of the council, or other tribunal of a municipal corporation, who shall vote to remit or release any part of the taxes so assessed on the property of any such corporation or company, shall be guilty of a misdemeanor, and fined five hundred dollars, and shall be removed from his office by the court by which the judgment of such fine is rendered, in addition to such fine. When such taxes and levies due to a municipal corporation are collected by the sheriff, he shall pay the same to the proper collecting officer or treasurer of such municipal corporation or otherwise, as the council, or other proper authority thereof may direct. And when such taxes and levies are paid into the treasury, as herein provided, the auditor shall account to the sheriff of each of the counties to which any sum so paid in for county levies belongs, for the amount due such county, and may arrange the same with such sheriff in his settlement

for the State taxes in such a way as may be most convenient; and the sheriff shall account to the county court of his county for the amount so received by him, in the same manner as for other county levies: Provided, that the taxes assessed for the last year of the term of office of a sheriff shall be paid to or settled with, the sheriff who was in office at the time the assessment was made. The amount so paid in for each district and independent school district shall be added to the distributable share of the school fund payable to such district, and paid upon the requisition of the county superintendent of free schools, in like manner as other school moneys are paid. The auditor shall certify to the county court of every such county, on or before the first day of April in each year, the amount with which the sheriff thereof is chargeable on account of the levy upon the property of such company. He shall also certify to the county superintendent of free schools the amount of such levies due to each district and independent school district in his county for free school purposes. The amount so paid in for each municipal corporation shall, as soon as received by the auditor, be paid over to the treasurer of the municipal corporation to which such taxes are due, or to such other officer of the corporation as the council may designate, and the auditor shall report such payment to the council. But the failure of the clerk of any county court, or the secretary of any board of education, or the proper officer of any municipal corporation, to certify to the auditor the levies or apportionment within the time herein prescribed, shall not invalidate or prevent the assessment required by this section, but the auditor shall make the assessment and proceed to collect or certify the same to the sheriff, as soon as practicable, after he shall obtain the information necessary to make such assessment. The right of the State, or of any county or district, or municipal corporation to enforce by suit or otherwise, the collection of taxes or levies, heretofore assessed, or the right to which has heretofore accrued, shall not in any manner be affected or impaired by anything in this chapter contained. All buildings and real estate owned by such company and used or occupied for any purpose not immediately connected with its railroad, or which is rented or occupied for any purpose to or by individuals, shall be assessed, with the taxes properly chargeable thereon, the same as other property of the like kind belonging to an individual. No such company or corporation as is mentioned in this section shall be exempt from taxation, whether the same has been or may be created, organized or operated by, under or by virtue of any general or special law or laws, or whether heretofore exempted from taxation or not, but this section shall apply to all such companies and corporations without distinction or exception."

PITTSBURGH &c. RAILWAY *v.* BOARD OF PUBLIC WORKS OF WEST VIRGINIA.[1]

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 8. Submitted January 25, 1898. — Decided November 28, 1898.

The collection of taxes assessed under the authority of a State is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case within some recognized head of equity jurisdiction.

A railroad bridge across a navigable river forming the boundary line between two States is not, by reason of being an instrument of interstate commerce, exempt from taxation by either State upon the part within it.

A railroad bridge is taxable under the Code of West Virginia of 1891, c. 29, § 67; and, although the board of public works assesses separately the whole length of the railroad track within the State, and that part of the bridge within the State, yet, if the railroad company does not, as allowed by that section, apply to the auditor to correct any supposed mistake in the assessment, nor appeal, within thirty days after receiving notice of the decision of the board, to the circuit court of the county, and the officers of the State make no attempt to interfere with the company's possession and control of its real estate, nor, until after the expiration of the thirty days, either to impose a penalty for delay in paying the taxes, or to levy on personal property for non-payment of them, the company cannot maintain a bill in equity in a court of the United States to restrain the assessment and collection of any part of the taxes.

THE Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, a corporation of the State of Ohio, owning and operating a railway running through the States of West Virginia, Ohio, Pennsylvania, Indiana and Illinois, under the laws of those States, and crossing the Ohio River, a navigable stream, forming the boundary between the States of West Vir-

[1] The docket title of this case is — "The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company *v.* The Board of Public Works of the State of West Virginia."

ginia and Ohio, by means of a bridge built, owned and controlled by the plaintiff, filed in the Circuit Court of the United States for the District of West Virginia a bill in equity against the Board of Public Works of the State of West Virginia, a public corporation, against its members individually, (being the governor, the auditor, the treasurer, the superintendent of free schools and the attorney general of the State,) and against one Cowan, sheriff of Brooke County, all of them citizens of that State, to restrain the assessment and collection of taxes upon the bridge under section 67 of chapter 29 of the Code of West Virginia of 1891.

The bill alleged that, under and by virtue of that section of the Code, the plaintiff was required, through its principal officers, to make return in writing, under oath, to the auditor of the State, on or before the 1st of April in each year, and in the manner prescribed by that section, of its property subject to taxation in the State; the auditor was required to bring the return, as soon as practicable, before the board of public works; that board was authorized either to approve the return, or to proceed to assess and fix the fair cash value of all the property of railroad companies which they were so required to return for taxation; and it was further provided that, as soon as possible after the value of any railroad property was fixed for purposes of taxation by one of the several methods designated by that section, the auditor should assess and charge such property with the taxes properly chargeable thereon.

The bill also alleged that the plaintiff's main line of railway ran through the State of West Virginia for a distance of 7.11 miles, of which 6.53 miles were in the county of Brooke and 0.58 miles in the county of Hancock; that its bridge across the Ohio River was part of its railway; that the total length of the bridge, including its abutments, was 2044 feet, of which 1518 feet were in West Virginia and 526 feet in Ohio; and that the plaintiff, before April 1, 1894, as required by section 67 of chapter 29 of the Code, made to the auditor of the State of West Virginia a return of its property subject to taxation in the State for the year 1894, (a copy of which was

annexed to and made part of the bill, and is set out in the margin,[1]) and, in making that return, included, in the 7.11 miles of its main track, so much of the bridge as lay within the State, amounting to 1518 feet.

The bill further alleged that some time in September, 1894, the board of public works, meeting at Charleston in that State, as provided by that section of the Code, to assess and fix the

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[1] Valuation of P., C., C. & St. L. R'y Main Line in the State of West Virginia as returned for Taxation for the Year 1894.

Brooke County. Cross Creek district:				
Main track	6.53 miles at	$13,000 00 =	$84,890 00	
Second track	6.53 " "	4,000 00 =	26,120 00	
Side track	12.62 " "	2.500 00 =	31,550 00	
Rolling stock	6.53 " "	3,567 78 =	23,293 00	
Telegraph line	6.53 " "	100 00 =	653 00	
Supplies and tools			1,306 00	
Station house at Colliers			1,300 00	
Water tank " "			400 00	
Sand house " "			50 00	
Car house " "			100 00	
Trainmen's house "			950 00	
Scale house at "			100 00	
Tower west of "			450 00	
Tower at New Cumberland Junction			800 00	
Station at Hollidays Cove			180 00	
Station at Wheeling Junction			400 00	
Total listed value for Brooke County				$172,547 00
Hancock County. Butler district:				
Main track	0.58 miles at	$13,000 00 =	$7,540 00	
Second track	0.58 " "	4,000 00 =	2,320 00	
Side tracks	0.95 " "	2,500 00 =	2,375 00	
Rolling stock	0.58 " "	3,567 00 =	2,069 00	
Telegraph line	0.58 " "	100 00 =	58 00	
Supplies and tools			116 00	
Total listed value for Hancock County				14,478 00
Total listed value of main line				$187,025 00

Summary of Mileage.

Main track	7.11 miles.
Second track	7.11 "
Side tracks	13.57 "
Rolling stock	7.11 "
Telegraph line	7.11 "

valuation of railroad property for the purposes of taxation, refused to approve the plaintiff's return, and proceeded, among other things, to assess the plaintiff with 6.53 miles of main track and 6.53 miles of second track in the county of Brooke, which assessment and valuation covered the entire length of its railroad in the State of West Virginia, including so much of the bridge as lay within the State; and, in addition thereto, valued and assessed the bridge, as a separate structure, at the sum of $200,000, placing the tax upon the bridge at $3060, and the auditor proceeded to assess the plaintiff with this sum of $3060; thereby assessing it with the entire length of the bridge in West Virginia as a part of its railway in the State, and also assessing it with the bridge as a separate structure, thus taxing the plaintiff a second time for that part of its bridge which lay in West Virginia; whereas the bridge should only have been assessed as so many feet of the railway.

The bill further alleged that neither the board of public works, nor any member thereof, nor the auditor, informed the plaintiff of the valuation which had been placed upon its property by the board for taxation, nor of the taxes which had been assessed thereon by the auditor; that on September 28, 1894, the plaintiff, not having been informed of the action of the board or of the auditor, addressed through its chief engineer a letter to the auditor, inquiring what action had been taken by the board of public works and the auditor with regard to the assessment of taxes on its property for 1894; that the letter was not answered, nor was any information in regard to the taxes given to the plaintiff until January 19, 1895, when it received from the auditor a statement showing that the board of public works had placed a separate and additional valuation of $200,000 upon the bridge for the purposes of taxation, and that the auditor had proceeded to assess and charge the plaintiff with the sum of $3060 as a tax for 1894 upon that valuation; and that on January 19, 1895, the auditor demanded of the plaintiff payment of that sum, and the plaintiff refused to pay it, but paid to the auditor the rest of the taxes assessed, amounting to the sum of $4187, upon a valua-

tion of $310,830, which included the plaintiff's railroad in the county of Hancock.

The bill further alleged that "on the — day of —— 1895" the auditor added ten per cent to the sum of $3060, to pay the expense of collection, and certified that sum, with the ten per cent added, to the sheriff of Brooke County for collection; and that the sheriff "since said date" had demanded payment of the sum of $3060 and the ten per cent additional, and was threatening to collect them by legal process, and would thus inflict irreparable injury upon the plaintiff, unless prevented by the interposition of a court of competent jurisdiction.

The plaintiff further alleged that the bridge constituted a part of its line of railway, and had no separate earning capacity, and no greater earning capacity than any other equal number of feet of its line of railway, and was used exclusively by it in transporting freight and passengers across the Ohio River to and from the States of West Virginia and Ohio; and that it was advised and believed that the bridge was an instrument of interstate commerce, and was not, as a separate structure from its line of railway, a proper subject for taxation by the State of West Virginia in the manner above set forth.

The bill then charged that the tax upon the bridge was illegal and unjust, and constituted a cloud upon the title to the bridge, and that by reason of that clause of the Constitution of the United States, which gives Congress control over interstate commerce, the Circuit Court of the United States for the District of West Virginia was clothed with authority and jurisdiction to restrain and to prevent the assessment and collection of this illegal and unjust tax; and prayed for an injunction against its assessment and collection, and for further relief.

The bill was sworn to March 18, 1895; and was filed March 25, 1895, together with an affidavit to the effect that, since the bill was sworn to, the sheriff had levied upon one of the plaintiff's freight engines for the purpose of enforcing the collection of the tax upon the bridge. Upon the filing of the bill, a temporary injunction was granted as prayed for.

A general demurrer to the bill was afterwards filed and

sustained, the injunction dissolved, and the bill dismissed. The plaintiff appealed to this court, under the act of March 3, 1891, c. 517, § 5. 26 Stat. 828.

Mr. J. Dunbar and *Mr. J. B. Sommerville* for appellant.

Mr. Edgar P. Rucker, attorney general of the State of West Virginia, *Mr. T. S. Riley* and *Mr. Thayer Melvin* for appellee.

Mr. Justice Gray, after stating the case, delivered the opinion of the court.

The collection of taxes assessed under the authority of a State is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction. *Dows* v. *Chicago*, 11 Wall. 108; *Hannewinkle* v. *Georgetown*, 15 Wall. 547; *State Railroad Tax cases*, 92 U. S. 575; *Union Pacific Railway* v. *Cheyenne*, 113 U. S. 516; *Milwaukee* v. *Kæffler*, 116 U. S. 219; *Shelton* v. *Platt*, 139 U. S. 591.

In *Dows* v. *Chicago*, a citizen of the State of New York, owning shares in a national bank organized and doing business in the city of Chicago, filed a bill in equity, in the Circuit Court of the United States for the Northern District of Illinois, to restrain the collection of a tax assessed by the city of Chicago upon his shares in the bank, alleging, among other things, that the tax was illegal and void, because the tax was not uniform and equal with taxes on other property as required by the constitution of the State, and because the shares were taxable only at the domicil of the owner and therefore were not property within the jurisdiction of the State of Illinois. This court, speaking by Mr. Justice Field, without considering the validity of the objections to the tax, held that the bill could not be maintained, saying: "Assuming the tax to

be illegal and void, we do not think any ground is presented by the bill, justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be invoked. It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of the government, and thereby cause serious detriment to the public. No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law." 11 Wall. 109, 110. "The party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action." 11 Wall. 112.

In the *State Railroad Tax cases*, this court, in a careful and thorough opinion delivered by Mr. Justice Miller, stated that "it has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves, give the right to an injunction in a

court of equity;" referred to section 3224 of the Revised Statutes, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court;" and said that "though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence." The court then quoted from *Dows* v. *Chicago*, and *Hannewinkle* v. *Georgetown*, above cited, and proceeded as follows: "We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes. But we may say that, in addition to illegality, hardship or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction; and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax. One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is that it has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the State. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the constitutions of all the States, and by the theory of our English origin, is exclusively legislative. A court of equity is, therefore, hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of, in whole or in part, without any power of doing complete justice by making, or causing to be made, a new assessment on any principle it may decide to be the right one. In this manner, it may, by enjoining the levy, enable the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in the proper manner." 92 U. S. 613–615.

In *Union Pacific Railway Co.* v. *Cheyenne*, in which the Union Pacific Railway Company obtained an injunction against the levy of a tax by the city of Cheyenne, the facts were peculiar. The plaintiff, owning many lots of land in that city, had paid a tax assessed on all its property by a board of equalization under a general statute of the Territory of Wyoming, and had also been taxed by the city of Cheyenne under provisions of its charter which had been repealed by that statute; and the bill showed, as stated in the opinion, that the levy complained of "would involve the plaintiff in a multiplicity of suits as to the title of lots laid out and being sold; would prevent their sale; and would cloud the title to all its real estate." 113 U. S. 526, 527.

In *Shelton* v. *Platt*, 139 U. S. 591, the president in behalf of himself and other members of an express company, a joint stock company of the State of New York, filed a bill in equity in a Circuit Court of the United States in Tennessee to restrain the collection of a license tax upon the company under a statute of the State of Tennessee, alleged to be contrary to the Constitution of the United States. The bill averred that the comptroller had issued a warrant of distress to a sheriff to collect such taxes for two years, the sheriff had levied or was about to levy the warrant on the property of the company, and the comptroller was about to issue a like warrant to collect the tax for a third year; that the property of the company in Tennessee was employed in interstate commerce in the express business, and was necessary to the conduct of it; and that the seizure by the sheriff would greatly embarrass the company in the conduct of that business and subject it to heavy loss and damage, and the public served by it to great loss and inconvenience. This court held that, even if the statute was unconstitutional and the tax void, the bill could not be maintained, and, speaking by the Chief Justice, said: "The trespass involved in the levy of the distress warrant was not shown to be continuous, destructive, inflictive of injury, incapable of being measured in money, or committed by irresponsible persons. So far as appeared, complete compensation for the resulting injury could have been had by recovery of dam-

ages in an action at law. There was no allegation of inability on the part of the express company to pay the amount of the taxes claimed, nor any averment showing that the seizure and sale of the particular property which might be levied on would subject it to loss, damage and inconvenience which would be in their nature irremediable." The court went on to say that another statute of the State (which had been adjudged by this court in *Tennessee* v. *Sneed*, 96 U. S. 69, to afford a simple and effective remedy) provided that where an officer charged by law with the collection of a tax took any steps to collect it, a party conceiving it to be unjust or illegal might pay it under protest and sue the officer to recover it back, and should have no other remedy by injunction or otherwise. The court observed that "legislation of this character has been called for by the embarrassments resulting from the improvident employment of the writ of injunction in arresting the collection of the public revenue; and, even in its absence, the strong arm of the court of chancery ought not to be interposed in that direction, except where resort to that court is grounded upon the settled principles which govern its jurisdiction;" and that the jurisdiction exercised by the courts of the United States to restrain by injunction the collection of a tax wholly illegal and void had always been rested on other grounds than merely the unconstitutionality of the tax. 139 U. S. 596–598.

In the light of these decisions, we proceed to an examination of the provisions of the Code of West Virginia of 1891, c. 29, § 67, under which the tax upon the plaintiff's bridge was assessed.

That section requires every corporation, owning or operating a railroad wholly or partly within the State, to make, through its principal officers, to the auditor of the State, on or before the 1st of April in each year, a return in writing, under oath, showing, among other things, the following: 1st. The whole number of its miles of railroad within the State. 2d. If the railroad is partly within and partly without the State, the whole number of miles within, and of those without the State, including all its branches. 3d. "Its railroad track in each county in this State through which it runs, giving the whole number of miles of road in the county, including the

track and its branches, and side and second tracks, switches and turnouts therein; and the fair cash value per mile of such railroad in each county, including in such valuation such main track, branches, side and second tracks, switches and turnouts." 4th. All its rolling stock, and the fair cash value thereof, distinguishing between what is used wholly within the State, and what is used partly within and partly without the State, and the proportionate value of the latter, according to the time used and the number of miles run thereby in and out of the State; "and the proportional cash value thereof to each county in this State through which such railroad runs." 5th. "Its depots, station houses, freight houses, machine and repair shops and machinery therein, and all other buildings, structures and appendages connected thereto or used therewith, together with all other real estate, other than its railroad track, owned or used by it in connection with its railroad, and not otherwise taxed, including telegraph lines owned or used by it; and the fair cash value of all buildings and structures, and all machinery and appendages, and of each parcel of such real estate, including such telegraph line, and the cash value thereof in each county in this State in which it is located."

The return made by the railroad company to the auditor is to be laid by him, as soon as practicable, before the board of public works. If the return is satisfactory to the board, the board shall approve it, and, by an order entered upon its records, direct the auditor to assess the property of the company with taxes, and he shall assess it as afterwards provided. But if the return is not satisfactory, the board is authorized to proceed, in such manner as it may deem best, to obtain the information required to be furnished by the return; and may compel the attendance of witnesses and the production of papers; and is directed, as soon as possible after having procured the necessary information, to assess and fix the fair cash value of all the property required to be returned, in each county through which the railroad runs; and, in ascertaining such value, to consider the return, and all the evidence and information that it has been able to procure, and all such as may be offered by the railroad company.

The legislature evidently intended that the annual return should include all the real estate owned or used by the railroad company in connection with its railroad within the State. The plaintiff's bridge across the Ohio River between the States of West Virginia and Ohio was real estate. It was a "building or structure," within the proper meaning of the words. *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 147; *Whitall* v. *Gloucester Freeholders*, 11 Vroom (40 N. J. Law), 302, 305. And it had been declared by Congress to be "a lawful structure." Act of July 14, 1862, c. 167; 12 Stat. 569. The fact that the bridge was an instrument of interstate commerce did not exempt so much of it as was within West Virginia from taxation by the State. *Henderson Bridge Co.* v. *Henderson*, 141 U. S. 679.

According to the facts alleged in the bill, and admitted by the demurrer, the plaintiff has been assessed by the board of public works one sum upon the whole length of its railroad track within the State, and another sum upon that part of the bridge within the State, as a separate structure.

The plaintiff alleged in the bill that its return included, in the number of miles of its main track, so much of the bridge as lay within the State; and contended that the bridge was included in "its railroad track," within the meaning of the third subdivision of the section of the code, above quoted, and therefore should have been assessed only as so many feet of the railroad. But the return does not mention the bridge; and, if it was included in the term "railroad track" in that subdivision, the increased value of the track by reason of the bridge might properly be taken into consideration in estimating the value of the railroad track, and the assessment of the track and the bridge separately would seem to be a difference of form rather than of substance. *Pittsburgh &c. Railway* v. *Backus*, 154 U. S. 421, 429; *Robertson* v. *Anderson*, 57 Iowa, 165.

If the bridge was not covered by the third subdivision, it was certainly included in the fifth. This subdivision begins by designating "depots, station houses, freight houses, machine and repair shops and machinery therein, and all other build-

ings, structures and appendages connected thereto or used therewith." It was argued that the words "thereto" and "therewith," in this sentence, referred to the same antecedent as the previous word "therein;" and that "therein" referred to depots, station houses, freight houses, machine and repair shops, and therefore "thereto" and "therewith" must be equally restricted. But if a strictly grammatical construction should be adopted, it may well be doubted whether "machinery therein" related to anything but machine and repair shops; and it can hardly have been the intention of the legislature to limit the words "buildings, structures and appendages connected thereto or used therewith" to those connected or used with such shops only. If the bridge is not a "building or structure," within the meaning of those words, as here used, it certainly (if not part of the "railroad track," under the third subdivision,) comes within the words next following, "together with all other real estate, other than its railroad track, owned or used by it in connection with its railroad." By a clause near the end of the same section, it is provided that "all buildings and real estate owned by such company, and used or occupied for any purpose not immediately connected with its railroad," are to be taxed like similar property of individuals.

The same section further provides that the decision made by the board of public works shall be final, unless the railroad company, within thirty days after such decision comes to its knowledge, appeals (which it is expressly authorized by the statute to do) from the decision, as to the assessment and valuation made in each county through which the railroad runs, to the circuit court of that county. The appeal is to have precedence over all other cases, and is to be tried as soon as possible after it is entered. That court, on such appeal, is to hear all legal evidence offered by the appellant, or by the State, county, district or municipal corporation, and, if satisfied that the valuation as fixed by the board of public works is correct, to confirm the same; but, if satisfied that such valuation is too high or too low, to correct it, and to ascertain and fix the true value of the property

according to the facts proved, and certify such value to the auditor.

This provision for a review and correction, by the circuit court of the county, of the assessment made by the board of public works affords a convenient and adequate remedy for any error in the taxation, and has been held by the highest court of the State to be in accordance with its constitution. *Wheeling Bridge Railway* v. *Paull*, 39 West Virginia, 142.

That court has often had occasion to inquire how far the action of the circuit court of the county, in this respect, is administrative only, and how far it may be considered as judicial in its nature. *Pittsburgh &c. Railway* v. *Board of Public Works*, 28 West Virginia, 264; *Charleston & Southside Bridge Co.* v. *Kanawha County Court*, 41 West Virginia, 658; *State* v. *South Penn Co.*, 42 West Virginia, 80. See also *Upshur County* v. *Rich*, 135 U. S. 467.

But it is not important, in this case, to pursue that course of inquiry; since, in matters of taxation, it is sufficient that the party assessed should have an opportunity to be heard, either before a judicial tribunal, or before a board of assessment, at some stage of the proceedings. *Kelly* v. *Pittsburgh*, 104 U. S. 78; *Pittsburgh &c. Railway* v. *Backus*, 154 U. S. 421.

Even if, therefore, no previous notice of the hearing before the board of public works was required by the statute, or was in fact given to this plaintiff, (which is by no means clear,) yet the notice of its decision, with the right to appeal therefrom to the circuit court of the county, and there to be heard and to offer evidence, before the valuation of its property for taxation was finally fixed, afforded the plaintiff all the notice to which it was entitled.

The railroad bridge in question being liable to assessment under section 67, it is unnecessary, for the purposes of this case, to determine whether it should be treated as "railroad track," or as a "building or structure," or as "other real estate, owned or used in connection with the railroad." In any view, its assessment and valuation by the board of public works, of which the plaintiff complains, was subject to review by the

circuit court of the county upon an appeal seasonably taken by the railroad company.

The section, indeed, also provides that, when the return made to the auditor is satisfactory to the board of public works, or when an assessment is made by that board, the auditor shall immediately certify, to the county court of each county through which the railroad runs, the value of the property of the railroad company therein, as valued and assessed as aforesaid; that that court shall apportion that value among the districts, school districts and municipal corporations through which the railroad runs; and that the clerk of that court, within thirty days after it has laid the county and district levies, shall certify to the auditor the apportionment so made; that the recording officer of each district or municipal corporation through which the road runs shall, within thirty days after a levy is laid therein, certify to the auditor the amount levied; and that, if any such officer fails to do so, the auditor may obtain the rate of taxation from the land books in his office or from any other source.

But the provision directing the auditor to immediately certify the assessment made by the board of public works to the county court of each county must be construed as subordinate to and controlled by the next preceding provision giving the right of appeal from the board of public works to the circuit court of the county — as clearly appears from the next succeeding provision, by which it is after the value of the property of the railroad company has been "fixed by the board of public works, or by the circuit court on appeal as aforesaid," that the auditor is directed to assess and charge the property of the company "with the taxes properly chargeable thereon," in a book to be kept by him for that purpose.

The statute also contains a provision that "no injunction shall be awarded by any court or judge to restrain the collection of the taxes, or any part of them, so assessed, except upon the ground that the assessment thereof was in violation of the Constitution of the United States, or of this State, or that the same were fraudulently assessed, or that there was a mistake made by the auditor in the amount of taxes properly charge-

able on the property of said corporation or company; and in the latter case no such injunction shall be awarded unless application be first made to the auditor to correct the mistake claimed, and the auditor shall refuse to do so, which facts shall be stated in the bill." While this provision cannot, of course, bind the courts of the United States, it is nearly in accord with the rule governing the exercise of the jurisdiction in equity of those courts, as established by the decisions cited at the beginning of this opinion.

The statute further makes it the duty of the auditor, "as soon as possible after he completes the said assessments," to make out and transmit to the railroad company "a statement of all taxes and levies so charged;" and the duty of the railroad company "so assessed and charged" to pay "the whole amount of such taxes and levies upon its property" by the 20th of January "next after the assessment thereof;" and if the company does not pay "such taxes and levies" by that day, the auditor is directed to add ten per cent to the amount thereof to pay the expenses of collecting them, and to certify to the sheriff of each county "the amount of such taxes and levies assessed within his county."

In the present case, the bill does not allege that there was any fraud in the assessment; or that the defendants made any attempt to interfere with the plaintiff's ownership or control of its real estate; or that the plaintiff either made any application to the auditor to correct any supposed mistake in the assessment, or took any appeal from the decision of the board of public works to the circuit court of the county; or that, within the thirty days allowed for such an appeal, any attempt was made by the defendants, either to charge the plaintiff with the penalty of ten per cent for delay in payment of the taxes, or to levy upon its property for non-payment of them.

On the contrary, the bill would appear to have been studiously framed to avoid making any such allegation. The bill, which was sworn to on March 18, 1895, alleged that on January 19, 1895, (sixty days before,) the plaintiff received notice from the auditor of the decision of the board of public works; that "on the —— day of 1895" (which might be any day

before the bill was sworn to) the auditor added the ten per cent and certified to the sheriff the amount of the tax assessed with that addition; and that the sheriff "since said date" had demanded payment of both sums from the plaintiff; and the affidavit filed with the bill on March 25, 1895, shows that the sheriff's levy on one of the plaintiff's engines was made after the bill was sworn to.

The only reasonable inference from these vague allegations of the bill is that the auditor waited for more than thirty days, after giving the plaintiff notice of the decision of the board of public works, in order to afford full opportunity for an appeal from that decision; and that no penalty was imposed for delay in payment of the taxes, nor any active measure taken to enforce them, until it had become clear that the plaintiff did not intend to take such an appeal.

The plaintiff, upon its own showing, having made no attempt to avail itself of the adequate remedies provided by the statute of the State for the review of the assessment complained of, is not entitled to maintain this bill.

Decree affirmed.